REPORTS

OF THAT

GRAVE and LEARNED

JUDGE,

Sir JOHN BRIDGMAN,

KNIGHT;

Serjeant at

P. 4. 19. Jur

LAVV,

SOMETIME

CHIEF JUSTICE

OF

CHESTER.

To which are added

Two Exact Tables, the one of the Cases, and the other of the Principal Matters therein contained.

LONDON,

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TO THE STUDENTS OF THE COMMON LAWS OF *ENGLAND.*

Gentlemen,

THeſe Enſuing Reports, being brought to me in Manuſcript (in the peculiar Dialect of our Common Law) I diſcovered the ſame to be the Hand-writing of that late Judicious and Honorable Perſon, Sir *John Bridgman* Knight, deceaſed, Serjeant at Law, heretofore Chief Juſtice of *Cheſter* (the memory of whoſe great Learning, and profoundneſſe in the Knowledge of the Laws of *England* ſtill liveth, although himſelf be dead) and thereupon beſtowed ſome pains in the peruſall thereof; wherein I found many things (in my weak apprehenſion) worthy of obſervation, which induced me to encourage the Tranſlation thereof into our Native Idiome (the Language enjoyned by the preſent Authority onely to be Uſed in things of this Nature) whereby the ſame might become of publike Uſe; if any, well acquainted with the Authors Character, ſhall doubt the Credit of this Copy; they may have the ſight of the Originall (the better to ſatisfie themſelves) by the help of the Stationer. The Caſes are not

placed in time as the ſame were adjudged, but Printed in that order as they were found under the Authors own Hand; For this Defect, it is hoped, that the Table may make amends, which you will finde to be a perfect Repertory as to each materiall thing contained in this Book;) What faults have eſcaped the Preſſe, will lye in the power of the judicious Reader to correct. Mr. *Bracton* in his firſt Book, Cap. 2. ſaith, *Si aliqua nova & inconſueta emerſerint, & quæ prius uſitata non fuerint in Regno; Si tamen ſimilia evenerint, per ſimile judicentur; cum bona ſit occaſio a ſimilibus procedere ad ſimilia.* Let this ſerve to Apologize for ſuch encouragement as hath been given by me for the publiſhing of theſe Reports; I having no other aim herein, then the Publike good; Farewell.

Middle Temple,

5 Nov. 1658.

J. H.

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THE REPORTS OF Serjeant BRIDGMAN.

Hill. 17 Jac. Rotulo 170. *Petts* againſt *Browne.*

A Man is ſeiſed of Land in Fee, and, having two Sons, doth deviſe his Land to his younger Son and his Heirs, and if he dye without Iſſue (living the eldeſt Son) then the elder ſhall have the Land to him and his Heirs: the Deviſor dies, the younger Son had iſſue a Daughter, that dyed without iſſue: then the younger Son ſuffers a common recovery with Voucher, to the uſe of him and his Heirs, and after deviſeth to another and his heirs, and then dies without iſſue, living the elder Son.

Whether the Deviſee or the elder Son ſhould have the Land? was the queſtion.

And the Counſell for the Deviſee raiſed three points.

1. Admitting that theſe words in the Deviſe were omitted, viz. (living the eldeſt Son) whether the younger Son had an Eſtate-taile, or not?

2. Whether theſe words do make ſuch alteration of the Eſtate, as to make the Eſtate a Fee-ſimple determinable upon this contingency, viz. (if he die without iſſue, living the elder Son?)

3. Admitting that there were ſuch a Fee in the younger Son, yet whether this Eſtate deviſed to the eldeſt Son, be not deſtroied by the recovery?

And as to the firſt point it was argued; that if theſe words of limitation (living the elder Son) had been omitted, the younger ſon had had an Eſtate-tail by this Deviſe, the remainder in fee to the eldeſt Son. I.

For although the Deviſe to the younger Son was to him and his heirs, which (in caſe the Deviſe had ſtayed there) had made a very good Fee-ſimple to the younger Son; yet when the Deviſor goes and declares further, and deviſeth, that if he dye without iſſue, that the elder ſon ſhall have the Land, this laſt limitation (if he dye without iſſue) doth reſtrain the generality of theſe words (his heirs) to the heirs of the body of the younger Son only, ſo that the laſt Deviſe to the

eldeſt Son doth declare and exemplifie what kind of heirs the Deviſor intended in the firſt Deviſe to the youngeſt Son: and in the 5 H. 6. and the 5. where Land was given to R. and K. his Wife, and their heirs, and to the heirs of the ſaid R. if the heirs of the ſaid R. and K. his wife living ſhould dye, and this was adjudged a good Eſtate in tail. And there it was ſaid by Hall, that if Land be given to a man and his Heirs for ever, Et ſi contingit ipſum Obire ſine hæredibus de corpore ſuo, this is a good eſtate in tail: and in the 19 H. 6. 74. by Vampage, If I give land to another and his heirs for ever in the beginning of the Deed, and then after I ſay Quod ſi contingat, that if he die without heirs of his body, that it ſhall remain to another, in this caſe the Law intends by the Si contingat, that it is but an Eſtate-tail. And in the Book of Aſſiſes 14. Land was given to B. and his heirs, to have and to hold to him and his heirs for ever, if B. ſhall have iſſue of his body, and if he die without heirs of his body, that the Land ſhall revert to the Donor and his heirs. B. had iſſue which died without iſſue, and it was adjudged that B. had but an Eſtate in tail, and becauſe he died without heirs of his body, it was adjudged that the Donor ſhould recover againſt the collaterall heire of B. And if the Law be ſo in Deeds or Grants executed in the life of the Donor, a fortiori in a Deviſe, which is to be taken more favourably then an eſtate made by Deed, and therefore it is ſufficient in a Deviſe to have the intention of the Deviſor underſtood, either to make an eſtate in fee or in tail, although proper words to make ſuch an eſtate be not uſed, and the intent of the Deviſor cannot be more manifeſt to have an eſtate in tail then in this caſe.

II. As to the ſecond Point, the queſtion will be, whether the younger Son hath an eſtate in Tail or in Fee determinable by this limitation: and it ſeemed to them that he ſhall have but an Eſtate in tail. In which, the queſtion is, to which eſtate theſe words of limitation, to wit (living the elder Son) ſhall be referred, viz. Whether to the Eſtate made to the younger Son, or to the Eſtate given to the elder, for if they be referred to the Eſtate made to the younger, there is no queſtion but theſe words do abridge & reſtrain the eſtate, but if to the elder, then they make no reſtraint or reſtriction as to the eſtate of the younger Son, but onely limit the remainder to the elder Son on this contingency only, viz. (If he be alive at the time of the death of the youngeſt Son without iſſue.) And to prove that theſe words ſhall be referred to the eſtate deviſed to the elder brother; They ſaid, That if the land had been deviſed to the younger Son and the heirs of his body, and if he dyed without iſſue, living the elder, that the elder ſhould have the eſtate to him and his heirs, it is clear that the younger hath an abſolute eſtate tail, and that then the remainder to the elder ſhall be on this contingency, viz. (If he be living when the younger dies without iſſue.) And ſo is Frenchmans Caſe, 1, & 2. Eliz. who demiſed land to his wife for life, the remainder to Charles Frenchman, and the heirs males of his body, and, if he died without heirs males of his body, the remainder to Arthur Frenchman and the heires males of his body. Charles had iſſue a Daughter, and died without iſſue male, and it was adjudged that the Daughter ſhould not have the land, for this contingency does not alter the Eſtatetail that was firſt limited to Charles, and, although the Deviſe in the caſe at Bar be to the youngeſt Son and his heirs without any limitation of his body, yet, the limitation

tation afterwards, to wit (if he die without iſſue) does explain well enough, that the heires of his body are intended, and then the ſubſequent words (living the Eldeſt Son) cannot alter the eſtate firſt given to the younger Son. And Hil. 40. Eliz. in the Kings Bench by Walmeſly, If one deviſeth land to his Son and his heirs, and further deviſeth that if he die without iſſue, that the land ſhall be ſold, yet the Son ſhall have an eſtate in fee and not in tail, but otherwiſe, if he deviſed that if he died without iſſue, that the lands ſhould remain over, for in the firſt caſe, he diſpoſeth of no more of the eſtate by the laſt words, then he did at the firſt, but in the laſt caſe he diſpoſeth of the eſtate it ſelf in remainder. And this was agreed by Owen, 18, & 19. Eliz. Rot. 354. and 15. & 16. Eliz. Rot. 330. where the caſe was, That one Edward Clark, being ſeiſed in fee of two houſes, had iſſue Henry, and two Daughters, Alice and Thomaſin; Henry dyed before the two daughters, living the Father, the Father deviſed one houſe to his daughter Alice and her heirs for ever, and the other to Thomaſin (who was at that time but eight years of age) and her heirs for ever, and if ſhe died before the age of ſixteen years (Alice then living) Alice ſhould have it to her and her heirs, and if Alice ſhould die having no iſſue (living Thomaſin) Thomaſin ſhould have the houſe of Alice to her and her heirs, and if both of them died without iſſue, he deviſed the two houſes to the two Daughters of his Son Henry and their heirs, and if they died without iſſue, he deviſed the remainder to a ſtranger. Proviſo, That if Alice ſhould marry I. S. that Thomaſin ſhould have her part to her and her heirs, and if Thomaſin ſhould dye having no Child, that the daughters of Henry ſhould have all, and if they died having no Child, the remainder to a ſtranger as aforeſaid. The Deviſor dies, then Alice marries N. but not I. S. and enters into her houſe, Thomaſin after ſixteen years of age dies without iſſue: And if Alice or the daughters of Henry ſhould have the eſtate of Thomaſin was the queſtion. And it was holden by three Juſtices, that the daughters of Henry ſhould have it, becauſe that Thomaſin did not die within the age of ſixteen years, and that, it being objected that there was no eſtate tail to any of the daughters but a feeſimple conditionall upon a contingent, it was at laſt adjudged 14. Eliz. Rot. 340. that they were Tenants in tail by this Deviſe, in Mich. 37, & 38. Eliz. 42. & Mich. 14, & 15. Eliz.

And Michaelmas 18. Jacobi. This Caſe was argued by Montague cheif Juſtice, Doderidge, Haughton and Chamberlain, who all agreed, that by this Deviſe the youngeſt Son had not an Eſtate-tail, but a limited fee, ſo that by his dying without iſſue, living the elder Son, his eſtate was quite determined; and all except Doderidge agreed, that the Recovery could not hurt the future Deviſe. But Doderidge was much againſt this opinion by reaſon of great miſcheif that might enſue by making of Perpetuities in Deviſes, and cited Archers Caſe, and Capels Caſe, but notwithſtanding Judgment was affirmed as aforeſaid. Judgment.

De

De Termin. Trinitat. 18 Jacob. Rot. 1198.

Dawtree againſt Dee, and others.

IN an Action on the Caſe, wherein the Plaintiff Declared, That he the fifth of July, 16 Jacobi, was and is ſeiſed in Fee of a Capital Meſſuage called Moor-place, with the appurtenances, and of 600 Acres of Land, meadow and paſture, in Petworth, with the ſaid Meſſuage uſed, of the annual value of 100 l. which Meſſuage he and thoſe whoſe Eſtate he hath in the ſaid Meſſuage and Tenements, therein Farmors and Tenants, have time out of minde uſed to keep good hoſpitality for the relieving of the Poor in Petworth aforeſaid, and that in the Church of Petworth aforeſaid, on the ſaid fifth of July and alſo time out of minde, there hath been and is a little Chancel, on the North part of the Parſons Chancel in the ſaid Church; and alſo whereas on the ſaid day, and time out of minde, there were divers Seats in the ſaid little Chancel, and that the Plaintiff and thoſe whoſe Eſtate he hath, time out of minde have repaired at their charges the ſaid little Chancel, and the Seats from time to time, as often as was needful: and by reaſon thereof, the Plaintiff, and all thoſe whoſe Eſtate he hath, have for all the ſaid time aforeſaid, onely power, liberty, and priviledg to ſit in any of the ſaid Seats in the ſaid little Chancel, to hear Divine Service in the ſaid Church, and alſo to bury the dead bodies of any perſon whatſoever in the ſaid Chancel, at the pleaſure of the Plaintiff, and thoſe whoſe Eſtate he hath; and for all the ſaid time have made convenient Graves in the ſaid Chancel, for the ſaid bodies, at their will and pleaſure: And that no other perſon, from any time ſince the memory of man, have uſed to ſit in any of the ſaid Seats, or to bury any dead bodies in the ſaid Chancel, without Licenſe of the Plaintiff, or thoſe whoſe Eſtate he hath. Nevertheleſs the Defendants, intending to diſinherit the Plaintiff, and to hinder and deprive him of the ſaid liberty, the ſaid day, and from thence until the firſt of May, 18 Jacobi, at Petworth aforeſaid: Prædictum Henricum ad ſedendum in ſedibus in Cancellula prædicta tunc exiſtentem, & ad intrandum in Cancellulam prædictam ad Divina Servitia in prædicta Eccleſia de Petworth celebrata, audiendum, fraudulenter & malitioſe impediverunt, per quod idem Henricus Dawtrey in Cancellula prædicta intrare, vel in eiſdem ſedibus ad Divina Servitia in eadem Eccleſia durante tempore illo celebrata audiendum per totum idem tempus ſedere non potuit, ad damnum 40 l.

The Defendants plead, That Henry Earl of Northumberland, the fifth of July, and long before, and always after until now, hath been, and yet is ſeiſed in fee of the Honor of Petworth, and of the ſaid little Chancel, as parcel of the ſaid Honor: and that the Defendants, as ſervants to the ſaid Earl, lived in the ſaid Honor; and by the ſaid Earls command, the ſaid fifth day of July, and for divers other days and times between the ſaid fifth day of July and the firſt of May, as often as Divine Service was celebrated in the ſaid Church, did ſit in the ſaid ſeats at the celebration of Divine Service, which are the Impediments the Plaintiff did complain of.

To which the Plaintiff demurred.

1. In

1. In this caſe it was argued for the Defendants, That the Declaration was not good, becauſe that the Plaintiff did not ſet forth the manner of the Diſturbance, whereupon iſſue might be taken thereupon, but onely declares that the Defendants did hinder him from ſitting in the Seats, or to enter into the Chancel, which allegation is too general, to take any certain iſſue upon: And ſo in the 10 Ed. 3. 39 A and B. where one lets Land for twelve years, and for ſecurity of the term, makes a Charter of Feoffment, upon condition, that if the Leſſee was diſturbed within the term, that he ſhould hold the Eſtate to him and his heirs. And all this matter was found by the Recognitors in an Aſsiſe upon the general iſſue, and that the Leſſee was diſturbed: And this Verdict was adjudged inſufficient, becauſe they did not finde how the diſturbance was made. Vid. 8 Rep. Francis Caſe, and the Commentaries 84. Stranges Caſe. That every Declaration ought to have ſuch certainty as the Defendant may know what matter to make anſwer unto. Vid. Comment. 202. ad 3 H. 7. 12. Return of a Reſcous ought to be certain to every intent, for that is in nature of a Declaration: And in the 22 Ed. 4. 47. Treſpaſs for divers treſpaſſes is not good, becauſe of the incertainty.

2. Admitting the Declaration is good; It ſeemeth that the Plea in Bar is good, becauſe the Defendants have made a good Juſtification, viz. That the Chancel is the Earls Inheritance, and that they did ſit there by his commandment: for although it might be true, that a Liberty to ſit and to bury there, yet he cannot reſtrain the owner of the ſoyl from the uſage of it: As, if one hath Common in the Land of another, or a Way, or other Eaſment, yet he cannot for theſe things, reſtrain the owner of the Land from making uſe of it. 21 H. 7. 39. If the Defendant in a Treſpaſs Quare clauſum fregit the firſt of May, does juſtifie the ſecond of May, which was the ſame Treſpaſs, this is a good Plea, becauſe it may be the ſame Treſpaſs, becauſe the day is not material: And 3 H. 6. 12. in a Treſpaſs for entry into his Warren, the Defendant pleaded that it was his Franktenement, and adjudged a good Plea as to the entry, becauſe he cannot enter into his own Land vi & armis: but he was put to plead further as to the Chaſing. 21 H. 6. 26. In a Treſpaſs for Battery in L, the Defendant juſtified for keeping his poſſeſſion in S, which is the ſame Treſpaſs, and adjudged a good Plea without Travers, becauſe it is Tranſitory.

But the Court agreed the Declaration was good and particular enough, as in a Quare Impedit. The Plaintiff did alledg generally that the Defendant hindered him to preſent, and that was good. And all the Judges agreed, that the Plea in Bar was utterly inſufficient; for one cannot have the Free-hold of a Church, or any part thereof. And Judgment was given for the Plaintiff. Judicium.

Daviſon againſt Culier. In the City of Norwich.

THe Plaintiff at the Seſſions of Peace held at Norwich, 16 Jacobi, did inform for the King and himſelf, That the Defendant, being a Grocer, the firſt of September then laſt paſt, at Norwich, did Ingroſs and get into his hands, by buying, contract, or promiſe, of

divers perſons unknown, 400 Quarters of Wheat, each Quarter at the price of 40 s. to the intent to ſell the ſame again, contrary to the form of the ſaid Statute: Wherefore he prayed, that the Defendant might forfeit the value of the Corn, and that he might have half the value, &c.

The Defendant pleaded Not guilty.

The Jury finde, that 5 Ed. 6. it was Enacted, That every perſon, who, after the firſt of May thence next enſuing, ſhall get into their hands, by buying, contract, or promiſe, &c. otherwiſe then by Deviſe, Grant, or Leaſe of Land or Title, any Corn growing in fields, or any other grain, butter, &c. or dead victuals, to the intent to ſell them again, ſhall be taken to be an Ingroſſer; and for the firſt offence ſhall be impriſoned two months without Bayl, and ſhall forfeit the value of the things ingroſſed. And as to 380 Quarters of the ſaid Wheat, they found the Defendant not guilty; and as to the twenty Quarters reſidue, they found that the Defendant the firſt of September 10 Jacobi, and continuing after till the tenth of Auguſt next following, at the ſaid City did uſe the art and trade of Starch-making; and that he the 21 of September 15 Jacobi, did get into his hands by buying, and not by Deviſe, Grant, or Leaſe, twenty Quarters of Wheat, reſidue of the ſaid 400 Quarters, to the intent to convert the ſame into Starch; and the 20 October, in the ſame year, did convert the ſame into Starch; and the 26 of October, did ſell the ſame to ſeveral perſons; and that every one of the ſaid Quarters at the 21 of September was of price 36 s. But whether the Defendant were guilty of the Ingroſſing aforeſaid, according to the form of the Statute, the Jury knew not, and therefore deſired the Opinion of the Court, but if otherwiſe, &c. And this Record was removed into the Kings-Bench by a Certiorare. And Judgment was given againſt the King and the Informer.

Judicium.

Moor againſt Sir George Reynel, Marſhal of the Marſhalſee.

IN an Action of the Caſe; wherein the Plaintiff declares, That he, the 15 Jacobi, did recover in the Common-Pleas 240 l. Debt againſt one Gilbert Alſop, and 20 l. damages, and that the Plaintiff, in execution of the ſaid Debt, did proſecute the ſaid Gilbert by ſeveral Judicial Writs iſſuing out of the ſaid Court. And that he, by a Writ of Exigi Facias, iſſuing out of the ſaid Court, the next Term after the ſaid Judgment, directed to the Sheriff of the City of Exeter, and Returnable before the ſaid Juſtices Quindena Martini, that the ſaid Gilbert the 28 Octob. 15 Jacobi, was Out-lawed in the ſaid City at the Suit of the Plaintiff in the Plea of Debt aforeſaid, unde tunc convictus fuit, &c. That Michaelmas 15 Jacobi, the Plaintiff took out of the ſaid Court a Capias ut lagatum againſt the Defendant, then to the ſaid Sheriff directed, returnable Octabis Purificationis. That the 8 Octob. 15 Jacobi, the ſaid Writ was delivered to the ſaid Sheriff. That the 20 January, 15 Jacobi, the Sheriff took the ſaid Gilbert, and held him in his Cuſtody. That the 23 Januarii, 15 Jacobi, a Habeas Corpus was awarded to have the Defendant cum cauſa, &c. Lunæ proxim. poſt craſtinam purificationis. At

which

which day he came to the ſaid Court in the Cuſtody of the ſaid Sheriff, who returned the ſaid Writ, That the twelfth of February the Defendant was committed by the ſaid Court to the Marſhalſey (the Defendant then, and yet being Marſhall) nevertheleſs the Defendant the thirteenth of April, 18. Jacobi, at Weſtminſter, did ſuffer the ſaid Gilbert to eſcape againſt the will of the Plaintiff, he being unſatisfied his ſaid Debt and damages, whereupon the ſaid Plaintiff hath loſt his ſaid Debt and damages, ad damnum 300 l.

The Defendant pleaded that the ſaid Gilbert was committed to him by vertue of the ſaid Writ, but ſaid further, that he remained in his Cuſtody from the aforeſaid twelfth of Febr. untill the twenty ſeventh of Febr. the 16. Jac. during all which time the Plaintiff never prayed to have the ſaid Gilbert in execution, neither was the ſaid Gilbert ever committed at the requeſt of the Plaintiff to the Marſhalſey, in execution for the ſaid debt and damages. And pleaded further, that the twenty ſeventh of Febr. 16. Jac. the ſaid Gilbert did eſcape againſt the will of the Defendant, which is the ſame eſcape, whereon the Plaintiff doth declare. Upon which Plea the Plaintiff did demur.

Bridgman for the Plaintiff. I conceive Judgment ought to be given for the Plaintiff, for, when the Defendant Alſop in the firſt Action was taken by the Capias utlagatum after Judgment, he was in execution for the Plaintiff. Vide Cokes Rep. Vernons Caſe: for in aſmuch as the King, by the originall Suit of the party, is entitled to have all the Goods and Chattels, and the Profits of the Land with his body alſo, by reaſon of the Outlawry, it is good reaſon that if the Defendant be taken at the Suit of the King, that as the King ſhal have benefit by the ſuit of the party, ſo the party ſhould have ſome benefit by the ſuit of the King.

Reſolved by the Court, that when he was taken by the Capias utlagatum iſſuing out of the Kings Bench, he ſhall be in execution for the Plaintiff preſently after the Arreſt, if the Plaintiff will, although his body was never brought into the Court, and although the Court did not commit him in execution for the party.

Note, that in all Caſes when the Defendant may have a Capias ad ſatisfaciendum, and the party Defendant is taken by a Capias pro fine, there the Defendant is in execution preſently, if the Plaintiff will without any Prayer of the party, but when the Plaintiff hath Judgment, and lets paſs his time, ſo that he cannot preſently neither by Capias nor by Fieri facias, but is driven to his Scire facias, there if the Defendant be taken by a Capias pro fine, the Plaintiff muſt pray that he may remain in execution for him, but this cannot be done without ſuch Prayer. Vide 5. Rep. Froſts Caſe, 22. Aſſiſe 74. If one condemned for a Diſſeiſin, with force, or fees be taken for the Fine, yet he ſhall not go at large if the party prayes that he may remain for his execution: and in 11. H. 7. 15 when the party may have execution without a Scire facias, the execution for the King ſhall be prayed for the party, and it is not materiall whether there were a Capias in the Originall, but otherwiſe if it be after a year, 2. Rich. 3. If one be taken for a fine to the King within the year, and the King pardons him, yet he may remain for the party. And ſo in this Caſe I conceive, that Gilbert was in execution for the party, and if he was not, yet the Plaintiff hath proved him in execution, from whence he eſcaped by the default

of

of the Defendant, ſo this Action doth well lye. Alſo the Plaintiff doth charge the Defendant with an eſcape, 13. April, 18. Jacobi, and the Defendant pleads an eſcape the 27. Febr. 16. Jacobi, which was a year and two daies before the eſcape alledged by the Plaintiff, to which the Defendant hath made no anſwer, and although he concludes that it was the ſame eſcape, which makes the plea good, where the time is not materiall, yet it is not in this caſe, for here it is admitted by the Defendant that the Plaintiff might have prayed him in execution ſo long as he remained in priſon, but it may be he made his prayer afterwards, viz. between the 27. Febr. 16. Jac. and the 13. April. 18. Jac. as it may very well be in this caſe, and then the averment of the Defendant is nothing to the purpoſe. Alſo the Defendant ſaith, that he remained in Priſon from the twelfth of February, 15. untill the ſeven and twentieth of February, 16. Jacobi. during which time the Plaintiff did not pray him in execution, in which caſe the day is excluded by this word Quouſque.

Crook contra, Who ſaid, that the Declaration was inſufficient, for it ought to have been Tam pro Domino Rege quam pro ſeipſo, becauſe here is a contempt to the King: But upon full debate of the Caſe, and upon ſhewing a Preſident to the Court which was Plt. Jacobi Rot. 308. in the Common Pleas, between King and Monlenax, where the Declaration was for the party onely, and all the Prothonotaries did certifie the Court, that the greater part of Preſidents of ſuch Actions brought in the Common Pleas, were for the party only, and not Tam pro Domino Rege quam ſeipſo, whereupon it was adjudged that it was good either way; and Judgment was given for the Plaintiff. And note that in this caſe the Judgment was Quod Defendans ſit in miſericordia, and not Quod capiatur, vide 27. Aſſiſe 11. 42. Aſſiſe, 17. Dyer 238. 40, & 41. Eliz. New Book of Entries, 44, & 45.

Judicium.

Baſſett againſt Jeſiock and Johnſon.

IN an Ejectione, the Jury gave a ſpeciall Verdict to this effect: That Queen Elizabeth was ſeiſed in fee in Jure coronæ of the Manor of Watton in the County of York, and that King James the 15. Martii. 2. Jac. did grant the ſame to William Brown and Robert Knight, and their Heirs, who the twenty ſeventh of April, 3. Jac. did bargaine and ſell the ſame to Michael Feilding and his heirs, who entred and died ſeiſed, and after whoſe death the ſame deſcended to Baſill Feilding as his Brother, who made a Leaſe to the Plaintiff.

Bridgman, It ſeemeth to me that the Plaintiff hath made a good Title: But it was obiected, that there was no good Title, for that it is not found that the Queen died ſeiſed, or that the Lands deſcended to the King.

But it was anſwered, that when the Queen was ſeiſed in Fee in Jure Coronæ, that ſhall be intended to continue, untill the contrary be ſhewed: for when an Eſtate of Inheritance is once alledged, it ſhall be intended ſtill to continue till the contrary be ſhewn. Plow. Com. 193. 431. and 202.

Judicium.

And afterwards, viz. 19. Jacobi, Judgment was given for the Plaintiff, without any argument at the Bench.

Trin.

Trin. 19. Jac. Samborne againſt Harilo.

IN an Action of Treſpaſſe, for that the Defendant 10. Octob. 44. Eliz. the Plaintiffs free Warren at Mouldford, in certain places there called Harecombe, Harcombe Coppice, and the Down, did break and enter, and did therein hunt without the licenſe of the Plaintiff, and three Hares and three hundred Conies did take and carry away. Continuando, as to the ſaid Hunting and taking and carrying away the ſaid Hares and Conies from the ſaid tenth day of October, to the firſt of November.

And further declared, that the tenth of April, 1. Jac. the Defendant the ſaid Warren in the ſaid places did break and enter, and therein, (without the licenſe of the Plaintiff) did hunt, and twenty Hares did take and carry away, continuing the ſaid hunting untill the firſt of March next after, &c.

And further declared, that the tenth of April, 2. Jac. the ſaid Defendant the ſaid Warren in the ſaid places did break and enter, and therein without the licenſe of the Plaintiff did hunt, and forty Hares and four hundred Conies did take and carry away, continuing the ſaid hunting untill the firſt of March following, contra pacem, &c. & ad damnum, &c.

The Defendant as to the Vi & armis, and to the firſt Treſpaſſe, (except the entring and hunting in the ſaid place called the Down, and the taking and carrying away the three hundred Conies) pleaded not guilty. And as to the entry, hunting and carrying away the ſaid Conies, he ſaith, that the ſaid place called the Down, is and hath been time out of mind Communis fundus, containing by eſtimation two hundred acres of Land and Paſture, and that before the ſaid tenth day of September, and before the ſaid Treſpaſſe, and at the ſaid time, the Defendant was ſeiſed of a Meſſuage and ſix Yard Land, containing a hundred and ſixty acres called the Manner of Southbery, in Mulford aforeſaid, and that the Defendant and all thoſe whoſe eſtate he hath in the premiſſes, time out of mind have had Common of Paſture in the ſaid Down for 200. and 40. Sheep, Levant and Couchant upon the ſaid Meſſuage and ſix Yard Land, and that the Defendant and all thoſe whoſe Eſtate, &c. have uſed for preſervation of the ſaid Common, as often as the ſaid Common hath been oppreſſed and troubled with Conies, have uſed of cuſtome to have liberty to hunt and to take the Conies: wherefore the Defendant the aforeſaid time of the aforeſaid firſt Treſpaſſe, and for preſervation of the ſaid Common from ſuch oppreſſion and diminution aforeſaid, into the ſaid Down did enter, and there hunted, and the ſaid Conies did take and carry away according to the ſaid cuſtome, and continuing the ſaid hunting all the ſaid time.

And as to the ſecond Treſpaſſe, beſides the entry and hunting in the ſaid places called Harecombe, & Harecombe Coppice and the Down, and the taking and carrying away two hundred Conies, he pleaded not guilty. And as to the entry and hunting in the ſaid places, &c. he ſaith, that the ſaid places called Harecombe, and Harecombe Coppice, are Woodland, containing by eſtimation ten acres, and that he was ſeiſed in Fee of the ſaid Meſſuage and ſix Yard Land, and made the

same prescription as aforesaid, for all his Horses, Cowes, Heifers, Bullocks, and two hundred and forty Sheep levant and couchant upon the said Tenements, viz. for the Horses, Cowes, &c. at the Feast of S. George, and from that time, untill the Corne growing in the Feilds at Moulford were carried away, and after the Corne carried away for the Sheep, untill the fourth of March next after, and made the former prescription for the Sheep in the Down; And the same prescription also for hunting and taking away the Conies as aboresaid, and so did justifie the taking of the said two hundred Conies.

And as to the third Trespasse (besides the entry and hunting in the said places, and the taking and carrying away of the said four hundred Conies) he pleaded not guilty, and as to this plea he made the same prescription as before, upon which plea the Plaintiff demurred in Law.

And if this matter pleaded in Bar was sufficient to bar the plaintiff of his Action was the question. And it seemeth to me that there is nothing in the Defendants plea to hinder the Plaintiff from having Judgment. And the better to argue upon this matter I will first endeavour to shew what interest a Commoner hath in the Soile, and what things he may do upon the Soile, for preservation of the said Common.

2. Whether this be a good usage and custome to enable the Defendant to hunt and kill Conies in the Plaintiffs free Warren.

And as to the first, I conceive that he that hath Common in anothers land, hath nothing at all to do with the Land any more then a meer Stranger, but only to put therein his Cattel, and to let them feed there with their mouths, and it is not his own Common until his Cattel have fed there. 14 H. 8. 10. The Owner of a Common cannot grant the Common to anothers use: Et 27 H. 8. 12. A Præcipe does not lye of a Common, for it is not my Common untill my Cattell have eaten of it, and therefore that which another hath is not mine, therefore I cannot have a Præcipe against him who hath not that which I demand: and in the 22. Assise 48. and 12. H. 8. 2. If a man hath Common in another mans Soile, and a Stranger puts in his Cattell, there the Commoner shall not have an Action of Trespasse, for although he hath Common, yet the Herbage doth not belong to him, neither can a Commoner do any thing upon the Soile which tends to the melioration or improving of the Common, as to cut Bushes, Ferne, or such things which do much impaire the Common, neither can he make a Fence or Ditch to let out the water which spoiles the Common: But if he be utterly disturbed of his Common, he may have an Assise, or a Quod permittat, and if any damage or annoyance be made upon the Land whereby he loseth his Common, he may have an Assise.

And as the Commoner may not meddle with the Soile, so cannot he meddle with any thing arising out of the Land, or that doth grow, or is nourished by the same, otherwise then to have his Cattell to feed there, and therefore it is adjudged Mich. 5. Jac. that a Commoner cannot kill Conies there, but may bring his Action on the Case.

But I agree that a Commoner may distrain Cattell Damage feasant, because their being there is a damage not onely to the Owner, but also to the Commoner, and a Commoner may abate a Hedge or a Gate that hinders him from comming to his Common: wherefore I conclude this first matter that the plea, as to that, is utterly insufficient

ent by the Law, if there were not a ſpeciall cuſtome alledged by the Defendant. And therefore it is to be conſidered, whether this preſcription alledged by the Defendant to hunt and kill Conies there for preſervation of his Common, be good or no.

And I conceive it is unreaſonable and not good, becauſe it is to the prejudice of the Owner of the Soile without any conſideration.

And it is unreaſonable for two cauſes, firſt, becauſe it is too generall, for the Defendant may hunt and kill as many Conies as he will, for he doth not claim to kill a certain number that do surcharge the Common, but generally (the Conies there.) Secondly, as this plea is, the Defendant makes himſelf his own Judge to kill the Conies as often and when he pleaſes.

Alſo it is againſt Law, for it is to the deſtruction of the Inheritance of another, which no perſon can juſtifie by cuſtome or preſcription, unleſſe for the benefit of the Common-weal 13 H.8. 16. It is Law to pull down a Houſe if the next houſe to it be on fire, and ſo the Suburbs of a Town may be pulled down in time of War, and if Enemies be on the Coaſt, it is good Law to come upon another mans Land, and make Bulwarks there; for the publick good is preferred before any mans private benefit.

But when it is only for the private benefit of a man it is otherwiſe, 43. Ed. 3. a. The Abbot ſaid, that he was Lord of the Town of A. and did preſcribe that when the Tenant ceaſed for two yeares, that he might enter untill he be ſatisfied his arreares. And it was held by the Court to be an ill cuſtome to put a man out of his Inheritance, yet is that more reaſonable then this caſe, for the time when the Lord ſhall enter is certaine, and the time that he ſhall hold the Land is alſo certaine: and 19. Elizab. Dyer 357. A cuſtome that all Tythes let or granted for more then ſix yeares of Land in ſuch a Towne, was held void by the Court, becauſe it is contrary to reaſon and to the liberty of the eſtate of him that hath a Fee. And 9 H.6.44.B. Cuſtome in a Leet, that if the petit Jury do make a falſe Preſentment, and this found by the grand Inqueſt, they ſhall be amended: and it was held by the Court to be no good cuſtome, and againſt common right, but if the cuſtome were, that if the petit Jury concealed any thing, they ought to preſent them to be amerced, this may be a cuſtome.

And to prove that Conies are part of the Inheritance, ſee Coke Rep. 7. in the caſe of Swans. But it may be objected that this uſage may have a legall beginning, viz. That it was ſo agreed at the time of the grant, or creation of the Common.

I anſwer, That then it ought to have been ſpecially pleaded, for elſe it ſhall not be ſo intended as it is proved in the 35 H.6. 28. Simon Eyres caſe, where a Cuſtome was pleaded in London, that if the goods of any man be pawned to a Citizen for a debt due to him, that he may detain them untill he be payed his debt; and it was urged becauſe that it may be good to bind the Debtor, becauſe it may be intended it began by his own grant, but it was ruled that it ſhall not be ſo intended, unleſſe it be ſpecially alledged.

And that a man ſhall not be Judge in his own caſe, is proved by 22. Edw. 5. 13. B. The Defendant pleaded that at another time he accounted to the Plaintiff in the preſence of A.B. & was found in arrear, wherefore he was committed to priſon, & there it was adjudged that the

party himself could not commit him to Prison, and that an Action of false Imprisonment did lie against the Plaintiff. And Cook R. 8. Dr. Bonhams Case. And in the 5 H. 7. 9. B. If one prescribes, that if any Cattel be taken upon his Land damage feasant, that he may distreyn them, and put them into the Pound, until amends be made according to his own will: this was held not good, because then he should be his own Judg, which is against reason. And in the 19 Edw. 2. gard. 127. A Custom was alledged in Ipswich, that when an Infant could count and measure, that he should be out of Ward, and holden to be voyd. 13 Edw. the 3. where a Custom was alledged, that when one could count 12 d. and measure a yard of cloth, he may alien his Land: and did aver, that the Demandant was of such age; but because he did not alledg the age in certain, it was adjudged against the Demandant. And Dyer 91. a. One grants to another all his Trees which may be reasonably spared, agreed that this was a voyd Grant for the incertainty. And in the 20 H. 7, 8. B. If Cestuy que use of a Mannor does bargain and sell 10 l. Land, parcel of the Mannor, no use is changed, for the incertainty.

Trinit. 18 Jacob. Ponesley against Blackman.

IN an Ejectment upon a Lease made by Richard Perriam the 19 of May 18 Jacobi, of a Messuage and Land in Thacham and Colthrop in the Parish of Thacham: Habendum from the Annunciation last past for three years, whereupon the Plaintiff entered and was possest, until the Defendant the 20 of May in the same year, did Eject him, ad dampnum, &c.

The Defendant pleaded Not guilty.

The Jury gave an Especial Verdict, viz. That before the Ejectment, John Curre was seised in fee of the said Lands, and the seventh of January 10 Jac. for 300 l. did bargain and sell the same to William Perriam and his Heirs, upon Condition that if the said John Curre, his Heirs, Executors, or Assignes, should pay to the said William, his Heirs or Assignes, at the house of C. B. in Westminster, 300 l. in manner following, viz. 10 l. the 9 of July then next coming, 10 l. the 9 of January next after, which shall be in the year 1613. 10 l. the 9 of July 1614. 10 l. the 9 of January next after, 10 l. the 9 of July 1615. 10 l. the ninth of January next after, 10 l. the ninth of July 1616. 10 l. the 9 of January next after, 10 l. the 9 of July 1617. and 210 l. the 9 of January next after: that then the Indenture should be voyd. Proviso semper, And it was agreed by the said Indenture, and the said parties, that the said William Perriam, his Heirs and Assigns, shall not take and intermeddle with the actual possession of the said Tenements, or with the receit of the Rents, issues, or profits thereof, until default were made of the payment of the said 300 l. or any part thereof, contrary to the limitation in the said Indenture.

And they found likewise, that the said William Perriam did not enter into the said Tenements.

And that afterwards, and before the first day of the payment, the said Curre did demise the said Tenements to William Dibley and Richard Carter by two several Demises, habendum for six years and an half, rendering Rent.

That

That the said Dibley and Carter, by vertue of the said several Demises, did enter and take the profits during the said term, claiming nothing but by the said several Demises, and that they payd the Rents during all that time to Curre, and that at the end of the said term they surrendered the Estate to Curre.

That 11 Octob. 16 Jacobi, William Perriam made his Will in writing, and thereby did Demise the said Tenements, &c. to Richard Perriam, and dyed.

That the said Richard Perriam the 19 Maii 18 Jac. did enter, and made the Lease to the Plaintiff, who entered and was possest, until the Defendant did Eject him.

That the said Richard Perriam was yet living.

But whether the Defendant were guilty or not, they prayed the advice of the Court, and if it seemed to the Court that he was guilty, then, &c.

It was argued on behalf of the Plaintiff.

That this agreement by Indenture, that the Bargainee shall not meddle with the possession, is a Lease for years to the Bargainor. I.

Admitting it to be no Lease for years, yet is the Bargainor Tenant at will; and when he makes a Lease for years, and the Tenant enters, he is a Disseisor; and then when the Bargainor enters, he is Tenant at will again, and so the Bargainee may very well Demise the Land. II.

And as to the first point, to make a Lease, the Law does require but the agreement of the parties, that the Lessee shall enjoy the Land and take the profits, and it is not necessary to have any precise words of a Demise or Grant, as in 5 H. 7. 1. by Frieux. If I make one Bayliff of my Manor for certain years, and that he shall have the profits without interruption, this is a Lease for years.

But it was objected, that there is no express words, that the Bargainor shall have the Land or the profit, but onely that the Bargainee shall not have it. 1 Object.

But it was answered, that the words did amount to so much; for when the Land is sold to the Bargainee, by the Law he ought to have the possession and profits: but when by the same Deed it is agreed, that he shall not intermeddle with the Land, it follows that the Bargainor shall have it, for he had it before, and there was nothing to exclude him but onely this Deed: and although by the Deed the Land is conveyed to the Bargainee, yet when by the same Deed it is agreed that he shall not have the possession, it follows that the possession shall remain in the Bargainor, in whom it was before the making of the said Deed, for no alteration is made thereof as to the possession. As in the 8 Assis. 34. one made a Feoffment, on condition that if such an act were not done, that the Land should return, &c. and the Feoffor re-entered for the condition broken: and there it was objected, that his entry was not congeable, because he must recover the Land by Action: but it was adjudged that his entry was good, and the same Law, if the words were, that for not performing, the Feoffor should retake the Land. Respons.

But it was objected, That it could be no Lease for the incertainty of the time. 2 Object.

It was answered, that notwithstanding it was a good Lease: for first, it is certain to continue until the time limited for the first payment Respons.

payment, and if that be done, then it is a good Leaſe until the ſecond payment; and is like to the Caſe where one lets Land for a year, and ſo from year to year, as long as both parties ſhall pleaſe: this is a good Leaſe for one year, and for every year after, when he hath entered before any diſagreement.

And, as to the ſecond Point, it is clear that the Bargainor is in at the will of the Bargainee, becauſe he enters by his agreement; and then when the Tenant at will makes a Leaſe for years, and the Leſſee enters, he is the onely Diſſeiſor; but if the Tenant at will infeoffs a ſtranger, then both are Diſſeiſors by the Statute of Weſtm. 2. Cap. 25.

And in the 12 Ed. 4. 12 B. If Tenant at will makes a Leaſe for years, this is a Diſſeiſin.

And the reaſon hereof is apparent; for the Tenant at will hath no Eſtate in the Land, and therefore he hath nothing to transfer to another. And in the 23 H. 8. B. If I let anothers Land for years, and the Leſſee enters, he is a Diſſeiſor: And 21 H. 7. 26. a. If Tenant at will makes a Leaſe for years, and the Leſſee enters, this is a Diſſeiſin to the firſt Leſſor.

And if the Tenant at will be outed by the Diſſeiſor, and re-enters, he hath reduced the Eſtate to the Leſſor: as in the Lord Abergevenies Caſe, reported briefly by the Lord Dyer 173.

Judicium. And after many arguments in this Caſe, Hillar. 20 Jacob. the Court agreed that the Demiſe was good; and Judgment was given for the Plaintiff.

Periman againſt Pierce and Margaret his Wife.

TEnant in Socage had iſſue by his firſt Wife, Joan, Elizabeth, and Agnes, and Alice and Elizabeth by his ſecond Wife, Katherine, Mary, William, and Joan by his third Wife; and by his Will did Deviſe his Land to Joan the younger for her life, rendering 13 s. 4 d. Rent to William, the remainder to William in Tayl, the remainder to Elizabeth and Mary for life, the remainder propinquo ſanguinitatis of the Deviſor for ever. William dyes without iſſue, Joan the younger dyes without iſſue, Elizabeth had iſſue William Stokes, and dyes; Mary had iſſue William Pierce, and dyes; Joan the elder dyes, having iſſue John Periman and William Periman; Agnes and Alice dye without iſſue: John Periman had iſſue, John Periman the Leſſor, and dyes; Elizabeth and Mary dye, Katherine dyes without iſſue, Elizabeth had iſſue George Dean and John Dean; Elizabeth deviſeth her Land to John Dean and his Heirs, and dyes: John Dean hath iſſue John Dean, and dyes: the Leſſor enters, and makes a Leaſe to the Plaintiff, who enters and is ejected by the Defendants, by commandment of the ſaid John Dean the ſon, upon which the Plaintiff brought an Ejectment.

And it ſeemeth to me that judgment ought to be given for the Plaintiff for all the Land, or at leaſt for part thereof.

And therefore in the firſt place I conceive, that when William the ſon dyed without iſſue, the remainder in fee did veſt in John Perriman, who was the eldeſt ſon of Joan the elder, who was the eldeſt daughter of the Deviſor: for although the Deviſor had many daughters,

daughters, yet his intent appeared in the Will to a ſingle perſon, and not to divers: alſo it appears, that he doth not intend that this remainder ſhould veſt in William his ſon, for he deviſeth to him a Rent during the life of Joan the younger, and afterwards an Eſtate Tail cannot be in Joan the younger, or any of her iſſues, becauſe that an expreſs Eſtate for life is limited to her; nor in Elizabeth or Mary, for he deviſeth a remainder to them for life; nor in any other of his daughters, for then he would have named them either by their proper names, or as his daughters, and not by ſuch circumlocution as is pretended in this Caſe.

Alſo, the words of Remainder in fee cannot extend to thoſe daughters, for they are proximæ conſanguinitatis, which does clearly exclude his own ſons and daughters, for they cannot properly be termed to be of conſanguinity of the blood of the father; as it is ſaid in Sir William Herberts Caſe, Cooks Rep. 3. that filius eſt pars patris, and this is proved by the uſual pleading of a Deſcent; for if the Plea be by any, except ſon or daughter, the form is to ſay, That the Land deſcends to him as Coſin and Heir, and ſhall ſhew how; but if by the ſon or daughter, then to plead as before. And 30 Aſſiſ. 47. Land was deviſed to one for life, the remainder to another for life, the remainder propinquioribus hæredibus de ſanguine puerorum of the Deviſor: there it is agreed that the ſons and daughters are excluded by that Deviſe.

And ſo here in this Caſe, neither William the ſon, nor any of the daughters of the Deviſor, can take any thing by this Deviſe; for they cannot be ſaid, de Conſanguinitate de ſanguine of the Deviſor, but the Iſſues of the Children of the Deviſor are comprized within theſe words. And then I conceive that the limitation being in the ſingular number, viz. proximo conſanguinitat. all the iſſues of thoſe Children ſhall not take, but one onely, and that as I conceive ſhall be the eldeſt ſon of the eldeſt daughter of the Deviſor, which was John Periman, father of the Leſſor of the Plaintiff; as in the 20 H. 6. 23. In an Account, ſuppoſing the Defendant to be his Receivor from the Feaſt of St. Michael, it ſhall be taken to be the principal Feaſt of St. Michael the Archangel, and not the Feaſt of St. Michael in Monte Tenebr. And 13 H 4. 4. 21 H. 68. 37 H. 6. 29. If father and ſon be of one name, ſcil. of J. S. If J. S. be named generally in a Writ, Recovery, or Deed, it ſhall be intended the father, for that he is moſt worthy. And ſo Pladwels Caſe in this Court, Mich. 38 and 39 Eliz. If a woman hath a Baſtard and two legal iſſues, and Land be given to one for life, the remainder to the eldeſt iſſue of the woman, the eldeſt legal iſſue ſhall take, and not the baſtard, although he be the eldeſt iſſue, for general words ſhall always be taken in the moſt worthy ſence.

And ſo here, the Deviſor did diſpoſe of his Eſtate to Joan the younger, rendering Rent to William his ſon, the remainder to William in Tail, the remainder to two of his daughters, ſcil. to Elizabeth and Mary for life, the remainder proxim. conſanguin. &c. in fee: By which words it is apparent, that the Deviſor intended, that for the default of the iſſues of William, and after the death of Elizabeth and Mary, the Eſtate ſhould remain to one who was next of blood to him, and that is John Periman the eldeſt ſon of his eldeſt daughter.

But admitting that all the iſſues of the daughters ſhall be in equal degree to take by this remainder, as well as the eldeſt ſon of Joan the eldeſt daughter; yet I conceive that thoſe daughters, who had an Eſtate deviſed to them by Will, are excluded. Cooks 8 Rep. 95. B.

Always

Always the intention of the Deviſor expreſſed in his Will, is the beſt Expoſitor and Director of his words: and therefore if Land be deviſed to one in perpetuum, this ſhall paſs a fee, although it be otherwiſe in a Grant: So if one deviſeth Land to another, to diſpoſe of, or ſell at his pleaſure, this is a fee to the Deviſee. Litt. 133. 19 H. 8, 9. B. And ſo in our Caſe, the intent of the Deviſor appears to diſpoſe of his Land among his Children and their iſſues: as in Trin. 38 Eliz. Ewre and Heydons Caſe. Heydon was ſeiſed of a Meſſuage in D, and of three houſes and certain Land in Watford, did deviſe his Meſſuage in D, and all his Land in Watford; it was judged the houſes in Watford did not paſs, in regard of the expreſs mentioning the houſes in D. and this was affirmed in a Writ of Error.

Edmund Meskin againſt John Hickford, Adminiſtrator of Henry Machin.

IN an Audita Querela; becauſe that the 11 Ed. 1. it was Enacted, That in regard that Merchants, which heretofore had lent their goods to divers perſons, were fallen into poverty, becauſe they had not ſuch ſpeedy remedy provided for them, for the Recovery of their Debts: Ac ratione inde multi Mercatores deſiſtebant venire in hanc terram cum Merchandizis ſuis, ad damnum tam Mercatorum quam totius Regni, quod Mercator qui volet eſſe ſecurus de debito ſuo, cauſaret debitorem ſuum venire coram Majore Londin. vel Eborac. ſive Briſtol. vel coram Majore & uno Clerico quem Rex appunctuaret pro eodem ad cognoſcendum debitum & diem ſolutionis, & recognitio irrotulat. foret in Rotulo cum manu dicti Clerici qui eſſet Notarius. Et ulterius quod dictus Clericus faceret de manu ſua propria ſcriptum obligatorium, ad quod ſigillum debitoris apponetur cum ſigillo Regis quod foret præmiſſis pro eo propoſito, quod quidem ſigillum remaneret in Cuſtodia Majoris & Clerici ſupradict. Et ſi debitor non ſolveret ad diem ei limitatam, Creditores venirent coram dictis Majore & Clerico, cum ſcripto ſuo obligatorio, & ſi compertum foret per Rotulam & ſcriptum obligatorium quod debitum cognitum fuiſſet, & quod dies ſolutionis eſſet expirat. Major immediate cauſaret bona mobilia (*Anglice*, the moveables) debitoris, vendi in tantum (*Anglice*, as far) quantum debitum in ſe attingat ad appreciationem proborum hominum ſecundum modum bonorum municipalium (*Anglice*, Borrough-goods) deviſabilium, quouſque plena ſumma debiti & monetæ foret creditori plenarie perſoluta, prout per eundem actum inter alia plenius apparet, cumque etiam per quendam alium Actum in Parliamento prædict. quondam Regis Edvardi primi apud Weſtm. in Comitat. Midd. poſt feſtum Paſchæ anno regni ſui tertio decimo, tent. edit. inter alia pro declaratione quorundam articulorum in prædicto Statut. de Acton Burnel mentionat. ordinat. & ſtabiliter exiſtat, quod Mercator propter aſſurantiam debiti ſui cauſaret debitorem ſuum venire coram Majore Londini, vel coram alio Capitali Guardiano ejuſdem civitatis, aut ullius bonæ villæ ubi Rex appunctuaret; aut coram Magiſtro aut Capitali Guardiano, ſeu alio probo homine abinde electo & jurato, quando Major vel Capitalis Guardianus ad illud non potuiſſet attendere, & coram uno Clericorum quos Rex inde aſſignaret quando ambo non potuiſſent eſſe attendentes cognoſcere debitum & diem ſolutionis, & Recognitio irrotulat. foret de manu unius Clericorum prædict. qui eſſet notarius; ac Rotulus foret duplex, unde una

pars

pars remaneret cum Majore vel Capitali Guardiano, & altera pars cum Clerico, qui inde primus foret nominat. & ulterius unus dictorum Clericorum ſcriberet de manu ſua propria ſcriptum obligatorium, ad quod ſigillum debitoris apponeretur cum ſigillo Domini Regis, quod quidem ſigillum foret de duabus preciis quarum una precia remaneret in cuſtodia Majoris vel Capitalis Guardiani & altera precia in manu Clerici prædict. Et ſi debitor non redderet debitum ad diem ei inde limitat. tunc Mercator veniret coram Majore & Clerico cum ſcripto ſuo obligatorio, & ſi compertum foret per rotulum vel ſcriptum obligatorium quod debitum cognitum fuiſſet, & dies ſolutionis inde limitat. foret expirat. Major vel Capitalis Guardianus cauſaret corpus debitoris (ſi laicus eſſet) capi, quandocunque contingeret in poteſtatem ſuam venire, & eundem debitorem Priſonæ villæ committere, ſi aliqua Priſona eſſet in eadem villa, & ibidem remaneret ad ejus propria cuſtagia quouſque pro debito aggreaſſet, & mandatum fuit quod Cuſtos Priſonæ villæ, retineret illum ſuper deliberationem Majoris ſive Capitalis Guardiani; & ſi Cuſtos non reciperet eum, tunc pro debito foret reſponſibilis, ſi unde haberet. Et ſi unde nihil haberet, tunc ille qui commiſit Priſonæ ad ejus cuſtodiam, reſponderet. Quodque ſi debitor per Majorem vel Capitalem Guardianum non potuiſſet invenire, tunc illi, ſeu eorum alterius in Cancellario ſub ſigillo Regis recognitionem ejuſdem debiti returnarent, & Cancellarius diriget (*Anglice*, ſhall award) Breve Vicecom. in cujus Comitat. debitor fore contigerit, ad corpus ejus (ſi laicus eſſet) capiend. & eum in Priſona ſalvum cuſtodiend. quouſque pro debito aggreaſſet. Et infra quarterium unius anni poſtquam captus foret, terræ ejus ei deliberarentur ſic quod pro profima inde debita, levaret & ſolveret, quodque ei licitum foret durant. eodem quarterio, terras & tenementa ſua vendere exoneratione debitorum ſuorum, & venditio ſua foret bona & effectualis, quodque ſi intra quarterium primum poſt quarterium illud expirat. non agrearet, tunc tota terra & bona debitoris Mercatori pro rationabil. extent. deliberarentur eodem tenendum quouſque debitum foret Plenarie levatum, & nihilominus corpus remaneret in Priſona ut ſupradictum eſt, & Mercator eodem debitori panem & aquam inveniret, idemque Mercator ſeiſinam in terris & tenementis illis ei deliberat. haberet, quod Breve Novæ diſſeiſinæ ſi extraponeretur manutener. ac etiam Rediſſeiſina de libero tenemento, tenendum ſibi & aſſignatis ſuis quouſque debitum foret perſolutum; quodque tam cito quam debitum foret levat. corpus debitoris cum terris ſuis, deliberat. foret, quodque in talis brevibus quos Cancellarius dirigeret (*Anglice*, ſhall award) mentio fieret quod Vicecomes Juſticiariis de utroque Banco certificaret ad certum diem quamlibet, mandatum Domini Regis performaſſet, ad quem diem Mercator foret coram eiſdem Juſticiariis ſi factum non foret agreamentum, & ſi Vicecomes non returnavit Breve, vel returnavit quod Breve tarde venit, aut quod ille Ballivis alicujus franchiſæ direxiſſet, Juſticiarii facerent prout in Statut. de Weſtm. continetur, quodque ſi Vicecomes returnaret quod debitor invenire non potuiſſet, vel quod Clericus eſſet, Mercatores haberent brevia omnibus Vicecomitibus ubi terras haberet, & quod omnia bona & terras debitoris pro rationabili extent. deliberarent tenendum ſibi & aſſignatis ſuis in forma prædicta, & haberet Breve cuicunque Vicecomiti quem voluiſſet ad corpus ejus (ſi laicus eſſet) capiendum, & in forma prædict. retinend. & Cuſtos Priſonæ caveat quod pro corpore reſponderet vel pro debito, quodque poſtquam terræ debitoris Mercatori deliberarentur debitor licite potuiſſet vendere terras, & pro eo quod Mercator nullum dampnum approvationum (*Anglice*, approvements)

habuit, & Mercatores ſemper allocarentur pro damnis ſuis & omnibus Cuſtagiis, laboribus, ſectis, dilationibus & expenſis rationabilibus, & quod ſi Debitor inveniret fidemſores poſt diem, ordinatum foret in omnibus ſicut dictum eſt de principali debitore quoad arreſtationem corporis, deliberationem terrarum, & alias res; quodque cum terræ debitorum Mercatori deliberarentur idem Mercator haberet ſeiſinam terrarum quæ fuerunt in manubus debitoris die recognitionis facti in quorumcunq; manubus poſtea devenirent, ſive per Feoffamentum vel aliter, & quod poſt debitum perſolutum terræ debitoris & exit. inde per Feoffamentum returnarent tam Feoffatus (*Anglice*, the Feoffee) quam aliæ terræ debitoris, quodque inſuper ſi debitor vel fidemſores ejus obierent, Mercator nullam haberet authoritatem ad corpus hæredis capiendum, ſed terras ſuas haberet, ſi ætatis foret, aut quando erit plenæ ætatis quoſque quantitatem, *Anglice* the quantity, & valorem debiti de terris levaſſet prout per eundem actum (inter alia) plenius apparet. Cumque etiam quidam Richardus Davies de Mitton infra parochiam de Breeden in Com. Wigorn. generoſus poſt editiones ſeperalium actuum prædictorum, ſcil. ultimo die Junii anno Regni Dominæ Elizabeth nuper Reginæ Angliæ quadrageſimo tertio apud Civitatem Gloceſtriæ in Comitat. Civitatis Gloceſtriæ, per quendam Henricum Machen generoſum nuper defunct. in vita ſua, ductus fuiſſet coram Johanne Thorne & Gulielmo Hill tunc Vicecomitibus & Balivis ejuſdem Civitat. cuſtodibus Majoris precii ſigilli Mercatoris intra eandem Civitatem, & Thoma Atkins Armigero, tunc Clerico ad recognitiones debitorum intra Civitatem illam accipiend. deputat. Cuſtodit. minoris precii ejuſdem ſigilli & ad tunc & ibidem coram eiſdem Vicecomitibus Ballivis & Clerico per quoddam ſcriptum ſuum obligatorium tunc & ibidem recognitum, ſed ſecundum formam Statutarum prædictarum non confect. neque format. gerens dat. eodem die & anno deveniſſet tent. & obligat. præfato Henrico in quingentis libris legalis monetæ Angliæ, quod quidem ſcriptum ſequitur in hæc verba.

Noverint univerſi per præſentes me Richardum Davis de Mitton in parochia de Breeden in Comitatu Wigorn. generoſ. teneri & per hoc præſens ſcriptum de Statuto Mercatorium firmiter obligari Henrico Machen de Crickley *in Comitat. Civitatis Gloceſtriæ generoſ. in quingentis libris bonæ & legalis monetæ Angliæ, ſolvend. eidem Henrico Machen, aut ſuo certo Attornato, Executoribus, & Aſſignatis ſuis: Et ſi non fecero, volo & concedo quod currant ſupra me, Hæredes, Executores, & Adminiſtrator. meos, diſtrictiones & pœnæ præmiſſæ in Statut. edit. in Parliamento Domini Edwardi primi quondam Regis Angliæ apud* Acton-Burnel, *Weſtminſt. pro debitis Mercatorum recuperand. Et facta fuit hæc recognitio in Civitate Gloceſtriæ coram Johanne Thorne & Gulielmo Hill Vicecomitibus & Ballivis Civitat. Gloceſt. predict. cuſtodibus Majoris precii ſigilli recogn. Statut. Mercatorum, ac Thoma Atkins, Armigero, Clerico Dominæ Reginæ & cuſtode minoris precii ſigilli Recogn. Statut. predict. ad Recognitiones debitorum apud Civitatem Gloceſt. predict. ſecundum formam Statuti capiend. deputat. In cujus rei teſtimonium huic præſenti ſcripto ego præfatus Richardus Davis ſigillum meum appoſui, & ſigillum prædictum ad Recognitiones ſecundum formam Statuti predict. ordinat. pro Majore ſecuritate inde præſentibus apponi procuravi. Dat. apud Gloceſt. predict. ultimo die Julii anno Regni Dominæ Reginæ Elizabethæ, Dei gratia Angliæ, Franciæ, & Hiberniæ Reginæ, Fidei Defenſoris quadrageſimo tertio, ac Anno Domini* 1601.

The

The Caſe.

RIchard Davis, being ſeiſed of Land in fee, did acknowledg a Statute Merchant of 500 l. to Richard Machin, to be payd to the Conuſee, &c. without expreſſing any day of payment; the Conuſor made a Leaſe of the Lands to E for years, who grants his Eſtate to B; the Conuſee dyes inteſtate, and his Adminiſtrator extends the Land, whereupon the Aſſignee of the Term brings his Audita Querela. And whether the Audita Querela will lie or not? was the Queſtion.

And I conceive that it will not lie: In which the Queſtion is onely, Whether this Statute, being without an expreſs day of payment, be good or not, and warranted by the Statutes of Acton-Burnel, & de Mercatoribus, or not?

And I conceive this is a good Statute, and well warranted by the ſaid Statutes.

And firſt, the intention, ſcope, and purpoſe of this Statute is to be conſidered; and that was, as I conceive, to provide ſpeedy remedy for Merchants, as well Forreigners as Natives, to receive their Debts: and this is grounded on very good reaſon; for Merchants are neceſſary members of the publique good; for by them and their Trade, the King hath profit by his Cuſtoms: 2. The King and his Subjects have Forreign Commodities for their neceſſary uſe: 3. They are the means of uttering the Commodities of this Land in Forreign parts: 4. The Subjects of the King are educated and inſtructed in Navigation. And the neceſſity of Merchants, and their good uſage, appears in Magna Charta 30. Omnes autem Mercatores niſi publice antea prohibiti fuerunt, habuerunt ſalvum & ſecurum conductum exire de Anglia, & venire in Angliam, & morare, & ire per Angliam tam per terram, quam per aquam, ad emendum vel vendendum, &c. And becauſe their repair into this Land was ſo neceſſary, theſe Statutes were made to give them ſecurity and remedy for their Debts ariſing for the ſale of their Merchandizes: and this is the whole ſcope and purpoſe of the Statute.

And to examine the parts of theſe Statutes, I conceive that ſome parts of this Statute are ſubſtantial and material, and therefore ought preciſely to be obſerved: and ſome are not ſo ſubſtantial, and this of the day is ſuch a one.

And firſt, the Debtor ought to come before the Major or other Officer and Clerk appointed, to take the Statute. 1.

He muſt there acknowledg the Debt. 2.

The Recognizance muſt be inrolled. 3.

The Clerk ought to make a Writing obligatory. 4.

It ought to be ſealed with the Seal of the Debtor, and the Seal appointed by the King, which by the laſt Statute ought to be of two parts, whereof one is to remain with the Major or other Officer, and the other with the Clerk. 5.

There ought to be a time of payment, and this ought to be ſo certain, that the Major, by view of the Roll, may certifie, that the time is paſt. 6.

And as to the other parts not ſubſtantial:

Although the Statutes appoint the taking of the Statute before the Major, or other chief Officer, in the ſingular number; yet the ſame may be done before any two chief Officers, as it is uſual in many Towns. 1.

2. Although the Statute ordains the inrolment, and the writing to be of the proper hand of the Clerk, yet it may be written by his Clerk or ſervant.

3. Although the time of the payment be limited by the Statute to be at a day certain, yet it is ſufficient if the time be certain, although no particular day be expreſſ in the Statute.

But all the firſt ſix matters being of ſubſtance, ought to be obſerved, as in Trinit. 37 Eliz. in this Court, between Worſly and Charnock, a Statute acknowledged which had but one piece of the Seal, adjudged voyd; and the ſame adjudged in the Caſe of Aſcue and Hollingworth, Trin. 37 Eliz. Rot. 343. and this is upon very good reaſon: for when the King hath committed the Cuſtody of the Seal to two, ſcil. to the Major and the Clerk, and to each a part, the part committed to one is not ſufficient. And all the other aforeſaid ſubſtantial parts are material parts of the ſaid Statute, except the writing of the Statute with the proper hand of the Clerk.

When the Queſtion in this Caſe is no more, then if there be a ſufficient time limited for the payment, and ſuch a time as the Major may certifie to be incurred, in caſe it be ſo required: And I conceive there is; for when he acknowledgeth the Debt to be due, and no time is expreſſed, the Law appoints the payment to be immediately, and that is ſuch a time as the Major by his Certificate may take notice of. 44 Ed. 3. 9. a. If a Bond be made, and no day of payment therein limited, it is due preſently, 4 Ed. 4 49. B. 9 Ed. 4. 22. but he ſhall not recover damages without demand. 14 H. 8. 29. 6. If one be bound in a Bond, and no day of payment be limited, and then the Obligor is bound in another Obligation to pay the mony at a day certain, if the mony be not payd at the day, he forfeits his ſecond Bond, and yet by the firſt Bond it was not payable before requeſt: But that requeſt is, becauſe, as I conceive, that he ſhall recover no damages before requeſt, but the mony is due preſently: and when the Law appoints a time certain, that is as good as if it had been expreſſ in the Bond it ſelf: As in the Statute of Weſtm. 1. cap. 38. where it is ordained, that in a Writ of Mortdanceſter, the Demandant ſhall count of the ſeiſin of his Anceſtor from the time of the Coronation of King Henry the third: Yet if an Infant brings a Mortdanceſter of the ſeiſin of his Father or Mother, he need not alledg this in his Writ, becauſe it appears to the Court. 16 Ed. 4. 47. In an Action on the Caſe, for diſturbing the Plaintiff of holding a Fair, and the Plaintiff preſcribed to have a Fair in C. for three days, ſcil. ab hora nona in vigilia ſancti Petri ad vincul. and for two days and a half next following: and this was held to be good, becauſe two days and two half days make 3 days.

And if the Statute had been in the hundred hour, or the thouſand hour, after the making thereof, here is no day limited; and yet I conceive, that no body will doubt, but that this is a good Statute. Cook. Rep. Signior Montjoyes Caſe. If one having authority to make Leaſes, reſerving the uſual Rent, does let Land, whereof the ancient Rent was a Quarter of Corn, reſerving eight Buſhels, this is a good Leaſe: for the Law reſpecteth not the forms of words, but the ſubſtance and effect of the matter.

Object. But it may be objected, That if the Statute doth not mention a day of payment, it is to no purpoſe to acknowledg ſuch a Statute; for if the mony be payable preſently, the Debtor may pay the mony, and ſpare the making of the Statute.

I

I anſwer, that the Statute intends onely to provide aſſurance to the Merchant for his debt, and not to give any day of payment to the Debtor, but to leave that to the agreement of the parties, and when the Merchant hath delivered his Goods, there is reaſon he ſhould have preſent ſecurity, and not preſent payment for them, unleſs it be otherwiſe agreed amongſt themſelves, but if they agree upon a day of payment, that may be put into the Statute, or elſe to have a Defeaſance, but this is not of neceſſity. There is a Rule in Law, that every Leaſe ought to have a certain time of beginning, and alſo of ending, yet if one makes a Leaſe for twenty years and does not ſay when it ſhall commence, this is a good Leaſe, for the Law will ſuppoſe the Leaſe to begin preſently. Reſponſ.

And it is ordered by the Statute, that the Writing obligatory ſhall be written with the proper hand of the Clark, yet it is a good Statute although it be written by his Servant, but otherwiſe in caſe of Authority to revoke, as in Coke Rep. Scroopes caſe, he who hath power under his hand to revoke cannot do it otherwiſe, Mich. 18. Jac. Thair againſt Thair, and Trin. 42. Eliz. Birde againſt Stride.

Furthermore theſe Statutes being taken for aſſurance of Merchants ſhall be expounded favourably for them, ſo far as the variance (if any be) of the Letter, ſhall not impeach it, 5. Rep. 77. a, 21. Edw. 3. 18. 10 Rep. 67. 27 H. 8. 10. 4 Rep. Vernons caſe.

And the form of the Statutes in Glocester, Hereford, and Briſtoll, and many other Towns, is to mention no day of payment, but ſome are made Sine ulteria dilatione, ſome Immediate, but the moſt uſuall do run as in our caſe, and the formes of Preſidents are much to be regarded.

As in the Comment. 163. Frogmorton againſt Tracy, Two Juſtices held that an Avowry by the Defendant was not good without averment, as ought to be in every Plea, but when all the Preſidents were ſhewn without averment, they were ſatisfied. And the ſame caſe is put in the Comment. 320. B. for a Rule that the Records of every Court are the moſt effectuall proofs of the Law of things treated in that Court: and in the 39. H. 6. 30. In a Writ of Deine, the Tenant ſhewed the Tenure only between the Deine and the Tenant, and not the Tenancy, between the Deine and the Lord Paramount, wherefore the Judges held the Plea naught: but when they had ſeen the Book of Preſidents, wherein it was uſuall to omit this, they changed their opinions, and ſaid that they would not alter the Preſidents. And in the 5. Ed. 4. 19. B. Babintons caſe. The cuſtome and courſe in a Court, and the Preſidents in a Court, do make a Law. Vide Rawlins caſe, Coke Rep. 14.

And the Statute provides only for Merchants for their debts, and yet none will deny, that if ſuch a Statute be acknowledged to one who is not a Merchant, or never uſed Merchandizes, yet it is good.

And Trin. 22. Jac. This caſe was argued by the Judges on the Bench, and Jones held the Statute good, but Hutton contra, and Winch and Hubbert held the Statute good. Wherefore Judgment was given, Quod querens nihil Capiat per breve. Judicium.

Garth

Garth against Ersfeild Knight *in Cancellar.*

In a *Scire facias* to have Execution of a Recognizance of eight hundred pounds acknowledged in the Chancery by Sir *Thomas Ersfeild* the Father of the Defendant the third of *May*, 14. *Jac.*

THE CASE.

Sir Thomas Ersfeild the Defendants Father was seised in Fee of divers Lands, and made a Feoffment to the use of himself for life, the remainder to the Defendant his Son in Tail, with divers remainders over, with power of revocation by writing under his hand and Seal, and publisht in the presence of three Witnesses. And then (for the consideration of four hundred pounds) did enter into this Recognizance to the Plaintiff, and dies.

And whether this Land were extendable or not against the Son was the question.

And I conceive that by the Statute of the 27. Eliz. this Recognizance may be extended against the Son, the words of which Statute are; And be it further enacted by the Authority aforesaid, that if any person or persons have heretofore, sithence the beginning of the Queens Majesties Reign that now is, made, or hereafter shall make any conveyance, Gift, Grant, or Demise, Charge, Limitation of Use or Uses, or Assurance of, in or out of any Lands, Tenements, or Hereditaments, with any Clause, Provision, Article, or Condition of Revocation, Determination, or alteration, at his or their will or pleasure, of such Conveyance, Assurance, Grants, Limitation of Uses or Estates, of, in or out of the said Lands, Tenements, or Hereditaments, or of, in, or out of any part or parcell of them, contained or mentioned in any Writing, Deed, or Indenture of such Assurance, Conveyance, Grant, or Gift, and after such Conveyance, Grant, Gift, Devise, Charge, limitation of Use or Assurance so made or had, shall or do bargaine, sell, demise, grant, convey, sell, or charge, the same Lands, Tenements, or Hereditaments, or any part or parcell thereof, to any person or persons, bodies Politick, or Corporate, for money or other good consideration paid or given, the said first Conveyance or Assurance, Gift, Grant, Demise, Charge, or Limitation not by him or them revoked, made void, or altered, according to the power and authority reserved or expressed unto him or them, in and by the said secret Conveyance, Assurance, Gift, or Grant. That then the said former Conveyance, Assurance, Gift, Grant, or Demise, as touching the said Lands, Tenements, and Hereditaments, so after sold, bargained, conveyed, demised, or charged, against the said Bargainees, Vendees, Lessees, Grantees, and every of them, their Heirs, Successors, Executors, Administrators, and Assigns, and against all and every person and persons which have, shall or may lawfully claim any thing by from or under them or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by vertue and force of this present Act.

So that this Statute doth not only aide Purchasors of the Lands, but those who for a valuable consideration have any charge out of the Land, or upon the Land.

Ent

But it may be objected that the Statute doth make the revokable Conveyance void only againſt the Bargainees, Vendees, Grantees, and Leſſees, but does not ſpeak of any Conuzee. Object.

But I anſwer, that it appears by the foregoing words, that the Statute intends to aide not only Bargainees, &c. but alſo all that have any charge out of the Land or upon the Land, and although the laſt words of the Statute doe not ſpeak expreſſly of Conuzees, yet the Statute ſhall be expounded to extend to them: and the Statute of Weſt. 2. cap. 1. Quod illi quibus tenementa data ſunt in Taile poteſtatem alienandi, &c. which words ſeem only to reſtrain the Donee in Tail. yet in the 5. Edw. 2. Form. 57. the iſſue is thereby reſtrained, and 3. Edw. 3. Formedon, 46. that Tenant in tail cannot charge the Land no more then alien can forfeit the Land, ſo that if he grant a Rent or acknowledge a Statute or Recognizance, or commit Felony or Treaſon, and dies, the Iſſue ſhal have the Land diſcharged. Reſponſ.

And this Statute hath alwaies been taken as to the equity thereof to relieve Purchaſors, and thoſe who have: and therefore in Coke R. 3. 82. B. Standen and Bullocks caſe, Mich. 42. & 43. Eliz. where a man had conveyed his Land to the uſe of himſelf for life, and then to the uſe of divers others of his blood, with future power of revocation, as after ſuch a Feaſt, or after the death of ſuch a one, and after, and before the power of revocation commenc'd, he (for a valuable conſideration) did bargain and ſell the Land to another and his Heirs; this bargain and ſale is within the remedy of the Statute: for although the Statute ſaith (the ſaid firſt Conveyance not by him revoked according to the power by him reſerved) which ſeems by the literall ſenſe to be intended of a preſent power of revocation; for no revocation may be made by force of a future power untill it comes in eſſe; yet it was holden that the intention of the Act was, that ſuch a voluntary Conveyance which was originally ſubject to the power of revocation, be it in preſent or in future, ſhall not be good againſt a Purchaſor bona fide upon valuable conſideration, and if other conſtruction be made, the Act will ſignifie very little, and it will be eaſie to evade ſuch an Act. And ſo if A. hath reſerved to him a power of revocation by the aſſent of B. and then A. bargains and ſells the Land to another, this bargain and ſale is good, and within the remedy of the ſaid Act.

The King againſt Sir John Byron Knight.

IN a Quo Warranto, for that the Defendant for a year paſt, hath uſed and yet doth uſe without any Warrant, within the Manor of Colſwick in the County of Nottingham, within the bounds of the Kings Foreſt of Sherwood, and within the reguards of the ſaid Foreſt; to have a Park within the ſaid Manor, with a Pale, Hedge, and Ditch incloſed, being two hundred acres of Paſture, and a hundred acres of Wood within the ſaid Park, Et ad venandum, capiendum, occidendum & apportandum in the ſaid Park, and two hundred acres of Paſture, and a hundred acres of Wood omnes & omnimodas damas Domini Regis Forreſtæ ſuæ prædict. in parcum prædict. & prædict. 200. acr. paſturæ & 100. acr. Boſci aliquo tempore venand. & occidend. Ita quod Forreſtini Domini Regis foreſtæ prædict. nec aliquæ aliæ perſonæ quæcunq; intromittantur ad venandum & fugandum intra parcum prædictum & 200. acr. paſturæ & 100. acr. Boſci ſine licentia defendentis.

The

The Defendant pleaded that John Biron Knight, the Defendants Grandfather was ſeiſed in Fee of a Meſſuage of a hundred acres of land, two hundred acres of Meadow, three hundred acres of paſture, and a hundred acres of wood in Colwick, in the County aforeſaid, now and time out of mind called the Mannor of Colwick, within the meets and bounds of the Foreſt aforeſaid. And that the ſaid John Byron the Grandfather, and all thoſe whoſe Eſtate the ſaid John Byron hath in the aforeſaid houſe, and a hundred acres of land, two hundred of Meadow, and three hundred of Paſture, and a hundred of Wood in Colwick aforeſaid, have had, held, and have accuſtomed to have in the aforeſaid two hundred acres of paſture, and a hundred of wood, parcel of the aforeſaid Tenements called the Mannor of Colwick, belonging to the ſaid Mannor of Colwick, incloſing, ditching, and hedging at their will and pleaſure, with all liberties, privileges, and Franchiſes to the ſaid Park belonging, and in the ſaid Park from the time aforeſaid have uſed to have and to keep Deer, and from time to time to conſtitute and appoint a Keeper of the ſaid Deer in the ſaid Park, who from the aforeſaid time have uſed to keep the ſame, ac ad venandum, fugandum, occidendum, capiendum & aſportandum omnes & omnimodas damas in eodem parco de tempore in tempus exiſtentes ita quod nullus foreſtarius Domini Regis, Foreſtæ prædictæ nec aliquæ aliæ perſonæ quæcunq; intromittantur ad venandum & fugandum in parco prædicto ſine licentia prædicti Johannis avi. And ſet forth that the ſaid John the Grandfather died ſeiſed, whereby the ſaid Mannor, &c. deſcended to Sir John Byron his Son. And that Hillary 3. Jacobi, a Fine was levied between Sir Peter Leigh and other Plaintiffs, and Sir John Byron the ſon Defendant of the ſaid Tenements, to the uſe of the ſaid Sir John for life, the remainder to the Defendant in tail.

And that the ſeventeenth of December, 10. Jac. did let the Premiſſes to the Defendant for eighty years, if the Leſſee ſhould ſo long live, wherby the Defendant the 26. Mar, 11. Jac, was and is thereof poſſeſſed, & did aver that the Mannor of Colwick in the information, and the ſaid Meſſuage, a hundred acres of Land, two hundred of Meadow, three hundred of Paſture, and a hundred of Wood to be the ſame, and did alſo aver the life of the Leſſor.

The Attorney Generall for the King did reply, that before the information ſc. 9 Octobr. 19. Jacobi, and long before, and continuing after untill the exhibiting of this information, the Defendant, the Park and Tenements aforeſaid, with Ditches, Hedges, and Fences had ſo ſleightly incloſed, that the Kings Deer of the aforeſaid Foreſt for defect of ſufficient incloſing of the Park and Tenements aforeſaid, through the default of the Defendant did enter, and the Deer of the King into the ſaid Park and Tenements aforeſaid, for the cauſe aforeſaid, entring, the Defendant did very unjuſtly kill the ſaid Deer in the ſaid Park and Tenements aforeſaid.

The Defendant did maintain his Bar, and traverſed without that, that the Defendant the Park and Tenements aforeſaid with ſuch ſleight Fences, Hedges, and Ditches incloſed did keep the ſame, Quod Damæ Regis de forreſta prædicta de tempore in tempus intra tempus prædictum in parcum & tenements prædicta pro defectu ſufficientis incluſuræ parci & tenementorum prædictorum in defectu defen. intraverunt, abſque hoc quod Defendens Damas Regis de forreſta prædicta in parco & tenementis prædictis pro defectu ſufficientis incluſuræ parci & tenementorum

mentorum prædictorum, in defectu defendentis minus, juſte interfecit modo & forma, prout, &c.

Whereupon the Attorney demurred.

And I conceive that Judgment ought to be given for the King. Firſt, Becauſe the plea in Bar and the Rejoynder made by the Defendant is altogether inſufficient for divers cauſes. Secondly, As to matter in Law.

And as to the firſt, The Quo Warranto doth ſuppoſe that the Defendant did uſe the liberties there mentioned within the Mannor of Colwick, being within the meets and bounds of the Foreſt of Sherwood, and within the Reguards of the ſaid Foreſt, and the Defendant did know this to be within the meets and bounds of the ſaid Foreſt, but does not anſwer whether it be within the Reguards or not, for it may be within the meets and bounds of the ſaid Foreſt, and yet not within the Reguards: as if the Mannor were diſforeſted by Carta foreſtæ, becauſe it was a Subjects Mannor and not the Kings, yet it remains within the meets and bounds of the ſaid Foreſt, but not within the Reguards, for now by the diſforeſting it is made purlue, and not ſubject to the Reguards and Lawes of the Foreſt, as to the Owner of the Mannor. Vide Carta Foreſta fol. 1. and yet notwithſtanding this Statute, if the King had granted this Mannor to be free of the Reguards, or out of the Reguards, yet is it ſtill within the meets and bounds of the ſaid Foreſt.

Secondly, The Dendant makes Title to the liberties whereof Sir John Byron his Grandfather was ſeiſed in Fee, viz. of a Meſſuage, a hundred acres of land, two hundred of Meadow, three hundred of Paſture, and a hundred of Wood in Colwick, now and time out of mind called the Mannor of Colwick, Quodque ille & omnes illi Quorum ſtatum idem Johannes habuit in tenementis prædictis, habuerunt, tenuerunt, & habere conſueverunt in prædictis 200. acris paſturæ & 100. acris boſci parcellis prædictorum tenementorum, vocat. mannerium de Colwick, prædictum parcum, tenementa prædicta, vocat. mannerium de Colwcik, ſpectant. & pertinent. &c.

So that the Defendant doth not preſcribe, but doth alledge only that Sir John Byron, and thoſe whoſe eſtate he hath, have uſed to have a Park, the which is no Title to the Park, for that ought to be time out of mind.

Thirdly, The Defendant doth claim to have a Park in the aforeſaid two hundred acres of paſture, and a hundred acres of wood, whereas there is no ſpeaking of two hundred acres of paſture before, and therefore he ought to have ſaid, in two hundred acres of paſture parcell of the ſaid three hundred acres.

Fourthly, The Defendant doth not anſwer to the killing of the Kings Deer of the Foreſt, but doth only juſtifie the killing of all Deer time out of mind being in the ſaid Park.

Fifthly, The Rejoynder is a manifeſt departure from the Bar, for in the Bar he claimeth to have a Park ditched and hedged, Per voluntatem eorum inclusum, ſo that by this pretence he may keep the Park with ſuch low Hedges as he will, and yet in his Rejoynder he doth traverſe, abſque hoc, that he kept the Park adeo parvis ſepibus & Foſſatis, quod Damæ Regis de foreſta prædicta in parcum prædictum pro defectu incluſuræ intraverunt, & abſque hoc, &c. So that the Defendant by his Rejoynder doth make an Iſſue upon that which he doth juſtifie in his Bar, and doth, upon the matter, deny in his Rejoynder, the matter alledged by him in his Bar.

And, as to the matter in Law, I conceive that the Defendant cannot preſcribe to have a Park in ſuch manner as he pretendeth, for that ſuch preſcription is quite contrary to the nature of his Royall Franchiſe of his Foreſt, and is to the deſtruction of it, for a Foreſt is a Royall Franchiſe, ſo that regularly none can have it but the King, as it was adjudged in this Court in a Quo Warranto againſt Humphrey Bigges. And Manwood fol. 1. A Foreſt is a certain Territory of Ground priviledged for wild Beaſts and Fowles of the Foreſt to reſt and abide in the ſafe protection of the King, for his Princely delight and pleaſure, and doth conſiſt of four things. 1. Vert. 2. Venilon. 3. Particular Laws and Priviledges. 4. Certain Officers.

But by this pretence of the Defendant, the Foreſt of the King is priviledged for wild Beaſts to reſt in protection of the King, but they are ſubject to being deſtroyed by the Defendant, for by ſuch pretence none can enter there but he or his Keepers. And I conceive that no body can pretend to have any profit or pleaſure in the Foreſt, which tends to the deſtruction of the Foreſt, and that is the reaſon that one cannot preſcribe to have Common in a Foreſt, for Sheep, Geeſe, Goats, or Hoggs, for to ſuffer them to Common there, is Ad magnum nocumentum ferarum foreſtæ: and ſuch a preſcription the Defendant maketh, which is not only Ad magnum nocumentum, but to the utter deſtruction of the Foreſt: And if it be objected, that this Park claimed by the Defendant is but a little part of the Foreſt, this is no anſwer; for as in the Caſe of a Common, no man may preſcribe to have Sheep, &c. in the Foreſt, ſo cannot he in any part of the Foreſt, and if the Defendant may preſcribe to have ſuch an irregular Park in part of the Foreſt, ſo may others claim ſuch like preſcriptions in other parts of the Foreſt, and ſo the King ſhall loſe all the Franchiſe of his Foreſt, and the Defendant may make his Fence or Ditch ſo low without ſide, and ſo high within, that the Kings Deer cannot get out again when they are come in, and ſo this Park ſhall be in the nature of a Trap to catch the Kings Deer.

And further, he that will preſcribe to have any common profit or pleaſure in the Freehold or Inheritance of another, ought to make his preſcription in ſuch manner, ſo that he muſt leave the reſidue of the profits to the Owner, and cannot utterly exclude the Owner, and therefore if one doth preſcribe to have all the Herbage, Pannage, and Profits of the Land of I. S. no man can conceive that this preſcription is good. Neither can a Commoner preſcribe that the Lord of the Soile cannot put in any Cattell into the Land. But in our caſe the very Franchiſe of the Kings Foreſt doth conſiſt of Vert, Venilon, Lands, and Officers of the Foreſt, for the King may have a Foreſt, although he hath no Land there.

And in the Commentaries 332. If a Manor within the Foreſt of Walcham be eſcheat to the King, and the King grants the Manor to one in fee, yet ſhall not he have the liberty of the Foreſt. And the ſame is alſo where the King grants all the Land which he hath in the Foreſt.

But notwithſtanding I agree that one may have a Park within a Foreſt by preſcription or by grant, but then the ſame ought to be kept ſo incloſed, that the Beaſts of the Foreſt cannot enter into the Park, which if not done, it is a forfeiture of the liberty of the Park, and ſo it is if he have a Sakerie, or Deer-leap, for the nature of a Park is to be incloſed: and in the 10. H. 7. 6. it is ſaid, that a Park conſiſts of Soile, Incloſure, and Game, and in the 15. Ed. 3. Tho-

cloſure and game. And in the 15 Edw. the 3. Thomas Earl of Lancaſter, Lord of a Foreſt, did grant leave to one John Harrington to make a Park within the ſaid Foreſt, and there it is adjudged, that if the Grantee does ſo sleightly incloſe the Park, ſo that the Foreſt-beaſts may get in there, that it is a forfeiture, and the Lord of the Foreſt may enter and take the Deer.

But by the pretence of the Defendant, the King ſhall not have ſo much power in this Land, being in the midſt of the Foreſt, as he hath in the Lands of any of his Subjects which do lie without the Foreſt: for if Foreſt Beaſts ſtray or wander into the Land of a Subject, out of the Foreſt, the Foreſters may enter into this Land, and rechaſe them into the Foreſt again.

Crocker againſt Kelſey.

HUsband and Wife, Tenants in Tail of the Gift of the Husband, the remainder to the Husband in fee: The Husband dyes, the Son and Heir of the Husband and Wife does levy a Fine with proclamations, to the uſe of him and his Heirs; the Wife does let a Leaſe of the Land for 21 years, and dyes; the Son deviſeth his Land to E and his Heirs, and dyes.

And, Whether this Leaſe made by the Wife were good to binde the Deviſee? was the Queſtion.

And I conceive that the Leaſe is good: For, although that by the Fine the Eſtate-tail is barred, as to the Conuſor and all his iſſues, yet does the Wife remain Tenant in Tail, as before: and therefore this Leaſe made by her is a good Eſtate, derived out of her Eſtate-tail, and ſhall binde all except the iſſues in Tail, who may claim per formam Doni: And ſo is it in the 33 H. 8. Dyer 51. B. Tenant in Tail, before the Statute of the 27 H. 8. does make a Feoffment to the uſe of himſelf in fee, and then he and his Feoffees make a Leaſe for years, rendering Rent, and then is the Statute made; the Tenant in Tail dyes, and then the iſſue aliens by Fine before any entry or receit of the Rent, and holden by all the Juſtices, except Sanders, that the Alienee ſhall not avoyd this: but otherwiſe of a Rent granted. And, ſuppoſe the Fine had not been levyed by the iſſue, he ſhall not avoyd the Leaſe without entry; and if he had aliened after the death of his Mother, and before entry, the Alienee ſhould never avoyd the Leaſe. And in the 29 Aſſiſ. 51. and the Comment. 557. Tenant in Tail acknowledgeth a Statute-Merchant, the iſſue is attaint of Felony, and pardoned; the Tenant in Tail dyes, the iſſue enters, and the Conuſee ſues out Execution: And becauſe the iſſue was diſabled to inherit the Eſtate-tail, therefore he had it as an Occupant, and ſo it was ſubject to the Execution. And, although the remainder in Fee does paſs by way of intereſt by the Fine, yet that cannot come in poſſeſſion ſo long as any iſſue in Tail is living: and therefore if a ſtranger had entered after the death of the Wife, the Son could not have had a Formedon in the remainder, for that muſt ſuppoſe the death of the Doners in Tail without iſſue, the which cannot be in our Caſe. Comment. 560. Aukens Caſe. Sir Thomas Wyat, Tenant in Tail of the Gift of the King, made a Leaſe for years rendering Rent, and dyed; Sir Thomas his ſon accepts the Rent, and after was attaint of Treaſon, and executed, having iſſue, and adjudged that the King ſhould have the Land

in point of Reverter discharged of the Lease. But in our Case, the act being done by the issue in Tail himself, shall not enable him to make voyd the Lease made by his Mother, no more then if a Tenant in Tail makes a Lease for years, and levies a Fine with proclamations to the Donor, and dyes having issue, yet the Donor shall not avoyd the Lease. Vid. Lord Aberganies Case, Cook. 6 Rep.

And although that the Wife were a Joyntress within the Statute of 11 H. 7. yet is this Lease clearly out of the Statute, because that it is no bar or discontinuance to the Estate in Tail, as it is in Sir George Browns Case, Cook. 3 Rep. for this Lease was voydable by the issue, unless he had bar'd himself by his own Fine.

And I conceive this Lease is also good against the Devisee: for when a Tenant in Tail makes a Lease for years, or grants a Rent common, &c. or acknowledgeth a Statute, or doth in some other manner charge the Land, this is a good Lease, Grant, or Charge to binde the Tenant in Tail, and all other, except the issues in Tail, and those in Reversion. And the reason of this is, because the Statute of Westminster 2. cap. 1. that was made to avoyd such charges, does not ayd any persons except the issues in Tail, and those in Remainder and Reversion. And therefore if Tenant in Tail grant a Rent, or acknowledg a Statute, and dyes, the issue shall not be charged with it, and so shall his Feoffee; but if the Tenant in Tail himself, after such charge, infeoffs another, and dyes, the Feoffee shall hold the Land charged: and if a Tenant in Tail makes a Lease for years, and dyes, and the issue doth accept the Rent, the Lease is made good, and is absolute: but if he dyes seised of the Estate-Tail, the issue hath his election, either to make the Estate good by his acceptance of the Rent, or to avoyd the Lease by his entry; and if he infeoff a Stranger before entry, the Feoffee shall never avoyd the Lease; and if the issue doth accept the Rent, he maketh the Lease good for his time: and as the Feoffee of the Tenant in Tail, and all those who come to the Land by any allurance made be the Tenant in Tail, whereby the Estate in Tail is barred or discontinued, shall hold the Estate charged with the Leases and charges made by the Tenant in Tail; so shall all those in like manner who come to the Land under the said Tenant in Tail, although the Estate-tail doth remain not barred or discontinued (saving the issues in Tail, who are ayded by the Statute of Westminster the 2.) And therefore, if Tenant in Tail grants a Rent in fee, and takes a Wife, and dyes, the Wife shall hold charged with the Rent: and so if a woman Tenant in Tail grants a Rent, and marries, and hath issue, and dyes, the Husband, being Tenant by the curtesie, shall hold the Land charged, for they are not ayded by the said Statute; and so if Tenant in Tail grants a Rent in Fee, and makes a Lease for three lives, warranted by the Statute of the 32 of Hen. the 8. and dyes, the Lessee shall hold the Land charged, Cooks Rep. 9. Count. Bedfords Case. And in the said Case of the Lord Abergeveny, it is said, that the surviving Joyntenant by acceptance of the Lease, hath deprived himself of the way and means of avoyding the charge; for vis accrescendi was the onely means of avoyding it, and the right of survivor is gone by the Release.

And so in our Case, the issue in Tail might have avoyded this Lease by his entry, but he hath quite barred himself by his Fine.

And as to the Statute of the 11 H. 7. cap. 20. I conceive that nothing is prohibited by this Statute, but onely such Acts as are a bar of the

the Eſtate-tail, or a diſcontinuance thereof; for ſo are the words of the Statute, viz. If any woman ſhall diſcontinue, alien, releaſe, or confirm, with Warranty, &c.

And in Sir George Browns Caſe, in Cooks Repor. fol. 350. it is there argued, Whether a Diſcontinuance without Warranty be within that Statute: but it was reſolved, that theſe words, with Warranty, doe refer onely to Releaſes and Confirmations, which make not diſcontinuance without Warranty: for the intention of the Statute was not onely to prohibit every bar, but alſo every diſcontinuance: but here in this caſe there is no bar or diſcontinuance; for the woman hath made a Leaſe for years, rendering Rent, by which the Eſtate-tail is neither bound nor diſcontinued, but the remains Tenant in Tail as ſhe was before, and ſo dyed ſeiſed of ſuch Eſtate; and therefore if it had not been for the Fine levyed by the iſſue in Tail himſelf, he might have entered, and have avoyded the Leaſe: and this is not like the Caſe there put by Anderſon; where Feme Tenant in Tail in Joynture within the Statute, does accept a Fine ſur conuſans de droit come ceo, &c. and therefore does grant and render the Eſtate for 1000 years; for though this be no diſcontinuance of the Eſtate-tail, yet is it a bar of the Eſtate during the time.

And Hillar. 22 Jacob. I argued this Caſe again: and all the Court, viz. Doderidge, Jones, and Whitlock, did agree, That the iſſue in Tail was barred by the Fine to avoyd this Leaſe; and that although the Eſtate-tail was barred, yet is it not extinguiſhed, but remains in eſſe to ſupport the Leaſe, ſo long as any iſſue in Tail does remain alive; and ſo they agreed the Leaſe to be good. Wherefore,

Judgment was given for the Plaintiff. Judicium.

George, Biſhop of Chicheſter, Plaintiff; John Freeland Defendant, 1 Caroli. Rot. 607.

The Caſe was; That a Biſhop was ſeiſed in fee of a Park, to which there was the office of a Keeper belonging, with a fee of five marks with a Livery, granted from time to time by the Biſhop. And the Biſhop does grant the ſaid Office together with the fees, necnon cum paſtura pro duobus equis in eodem Parco, which Grant was confirmed by the Dean and Chapter. The Biſhop dyes, and another is made Biſhop: And whether this Grant was good to binde the Succeſſor? was the Queſtion.

And I conceive that this is a good Grant againſt the Succeſſor, and will binde him.

And firſt, I conceive it will not be denyed, but that if a Biſhop hath a Park, he by the Common Law may grant the Office of the Keeper of that Park to whom he will, with ſuch fees and wages, and for ſuch an eſtate as he will: and this being confirmed by the Dean and Chapter, is good to binde the Succeſſor: and therefore it is to be conſidered, Whether any alteration of the Law be made in this point by reaſon of any Statute?

In the Biſhop of Salisburies Caſe, Cooks 10 Rep. it is there reſolved, that by the Statute of the firſt of Elizabeth, Biſhops are thereby generally reſtrained from making any eſtate or intereſt of any Lands, Tenements, or Hereditaments, parcel of their Biſhoprick, or any charge or incumbrance out of the ſame, or of any other thing in their diſpoſition

disposition to binde their Successors; except onely Leases for 21 years, or three lives, of such Lands, Tenements, and Hereditaments, which have been usually demised, or whereupon the usual Rents have been reserved, according to the said Act. And, although such Lease be made of such Lands usually demised, reserving the usual Rent according to the said Statute; yet, unless all the limitations prescribed by the Statute of the 32 of Hen. 8. be not pursued; as, if it be not all in possession, or, that the old Lease be not expired or surrendred within one year (which is not prohibited by the first of Eliz. as it was adjudged in Foxes Case) then such Lease will not binde the Successor, unless it be confirmed by the Dean and Chapter. And such construction as aforesaid hath been made to disable a Bishop to make any Estate, except Leases for 21 years, or for three lives, as is aforesaid, as concerning the binding of the Successor, as the Grant of the next avoydance by a Bishop to another, although it be confirmed by the Dean and Chapter, is restrained by the said Statute of Elizabeth to binde the Successor, as it hath often been judged: and the reason is, because it is such an Hereditament whereon no Rent may be reserved, for all in the Statute, that is not permitted in the Exception, is restrained as to the Successor by the general purview of the said Act: but yet such Grant will binde the Bishop himself, although the Statute says, that it shall be voyd against all intents and purposes: for the makers of the said Act did intend, not onely the advancement of Religion, but also increase of good Hospitality, and avoyding dilapidations and ruine of the Church, which the Successor, if the Acts of his Predecessor should binde him, were not able to remedy, and therefore the makers of that Act did rather regard the Successor. And these words in the Act, viz. Parcel of the possessions of his Archbishoprick or Bishoprick, or united, belonging, or appertaining to the said Archbishoprick or Bishoprick, may be very aptly construed, That the Gift of this Office, and all other such like things that are belonging to the Archbishoprick or Bishoprick: for although the Bishop cannot exercise this Office himself, yet hath he an inheritance in the gift and disposing thereof: and so it is adjudged in Cooks 8 Rep. Earl of Rutlands Case. And these words, Belonging to the Archbishoprick or Bishoprick, shall be expounded for, Concerning the Archbishoprick or Bishoprick. And therefore if a Writ of Annuity be brought against a Bishop, upon a title of prescription, or otherwise, and Judgment be given against him upon Verdict or confession, this is restrained by this Act, because the Bishop is charged with this Annuity in respect of his Bishoprick; and therefore the Successor shall be charged with the arrears incurred in the life of the Predecessor, 21 H. 7. 4. 48 Ed. 3. 26. 33 H. 6. 44. and yet is not the Annuity issuing out of the Bishoprick, as appears in the 10 H. 6. 10. and 10 Ed. 4. 10. But because this does concern the Bishoprick, and does tend to the diminution of the revenues, and the impoverishing of the revenues, this is restrained by the said Act of the first of Eliz. And therefore to answer to the Objection, Wherefore such an Office should be granted to one solely; I answer (and it was also agreed to by all the Court) That if the Office be ancient and necessary, the Grant thereof, with the ancient fee, is no diminution of the Revenue, or impoverishing the Successor; and therefore of necessity such Grants are exempted out of the general restraint of the said Act of Elizabeth: For, as Bracton saith, Illud quod alias licitum non est, necessitas facit licitum, & necessitas inducit privilegium quod jure privatur.

privatur. And if Biſhops have not power to grant ſuch Offices of ſervice and neceſſity for the life of the Grantees, but that their eſtates ſhall depend on incertainties, as on the death or tranſmutation of the Biſhop, then no able or ſufficient perſons will be willing to ſerve them in ſuch Offices, or at leaſt will not diſcharge their Office with any cheerfulneſs or alacrity, if they may not have ſuch eſtate in certain for the term of their lives, as their Predeceſſors had: but when an ancient Office is granted to one, it is not of neceſsity to grant the ſame to two; and therefore ſuch Grant is not exempted out of the general reſtraint of the Statute, no more then if the Biſhop ſhould grant an Office with the ancient fee to one, and then he grants the Reverſion to another; this is reſtrained by the Statute, becauſe it is not of neceſsity: and if the Biſhop may grant ſuch Offices to two, he may grant them without any limitation of lives, and by conſequence ad infinitum: and ſo, if he may grant a Reverſion to one, ſo he may to others alſo without any limitation: and by the ſame reaſon he may grant them in Tail or in Fee, which is quite contrary to the intention of the ſaid Act. And of ſuch opinion was Popham, Chief Juſtice, Michaelm. 44 & 45 Eliz. in Stumblers Caſe, and Dyer 23 Eliz. 370. where Horn, Biſhop of Winchester, did grant to Dr. Dale during his life a Rent out of the Manor of Waltham, pro conciſio impendendo: the Biſhop dyed, and becauſe the Rent was arrear, Dr. Dale brought an Action of Debt, for the arrears incurred in his life, againſt the Executors: In which two points are to be obſerved; 1. That the Grant was not voyd againſt the Biſhop himſelf: The other, That although the Rent was iſſuing out of the poſſeſſions, and not parcel, this was voyd by his death. And Trin. 30 Eliz. Rot. 346. in this Court: The Biſhop of Cheſter, after the Statute of 1 Eliz. did grant to George Boulton an Annuity of five marks per annum, pro conciſio impenſo & impendendo, which was confirmed by the Dean and Chapter: and then the Biſhop dyed, and Boulton brought a Writ of Annuity againſt the Succeſſor, and in his Count did aver, that the Predeceſſors of the ſaid Biſhop had granted reaſonable Fees (but did not aver, that this Fee has been granted before) and did aver, that he was homo conſiliarius, & in lege peritus; and the Opinion of the Court was againſt the Plaintiff. But there it was reſolved, that although the ſaid Biſhoprick was founded but of late times, to wit, in the time of Hen. the eight; yet a Grant of an Office of neceſſity to one in poſſeſſion with reaſonable fees (the reaſonableneſs whereof is to be decided by the Court of Juſtice wherein the ſame doth depend) is good, and is reſtrained out of the general words of the ſaid Act.

And in our Caſe the avowant hath averred this Office to be an ancient Office, and which hath been granted with a fee of five marks from time to time, by the Biſhop grantor and his Predeceſſors, to whom they pleaſed. Cooks 9 Rep. Earl of Shrewsburies Caſe. The Earl of Rutland was made Steward of a Manor for life, without any words to make a Deputy; yet it was reſolved that he might make a Deputy, becauſe it was not convenient for him to exerciſe ſuch an Office: So if an Office doth deſcend to an Infant, he muſt of neceſſity make a Deputy. And ſo if a Biſhop be ſeiſed of a Manor, he may ordain a Steward of the ſaid Manor, and may grant to the Steward a fee for the execution of the ſaid Office, according to the reſolution in the ſaid Caſe of the Biſhop of Cheſter.

But

Object. But it may be objected, that here is a greater Fee granted then was before, viz. Paſture for two Horſes, and therefore the Grant is not good to bind the Succeſſor.

Reſponſ. And I do agree that the Grant of the ſaid Paſture is void, yet that ſhall not at all prejudice the Grant of the ſaid Office with the ancient Fee, for they are ſeverall and diſtinct Grants, ſo that the one, viz. The Grant of the Office with the ancient Fee is good by the Law againſt the Succeſſor, and the other void againſt the Succeſſor,, but it cannot hurt the grant of the Office and ancient Fee, no more then if a Biſhop ſhould grant an old Office with an ancient fee, and alſo a new Office which was never granted before, and all this by one Deed of Grant, and this is duely confirmed, although this be void againſt the Succeſſor as to the new Office, yet it is good for the ancient Office and the ancient fee: for although theſe fees are contained in one Deed, yet are they ſeverall and diſtinct, ſo that one may be good and the other void, 33. H. 8. Dyer 48. One ſeiſed of a Manor to which a Villain was reguardant, did grant one acre, and alſo the Villain, the Villain did paſs in groſs and the reaſon there given is, becauſe there be ſeverall Gifts contained in one Deed.

Alſo the Averment of the Plaintiff is inſufficient, viz. That the paſture was never granted by any of the Predeceſſors of the Grantor, ſo that it may be that they were granted by himſelf, being Biſhop, many times before the ſaid Statute, and then the Succeſſor may well grant it: and in the ſaid caſe of the Biſhop of Salisbury, it is averred that the Grant was not by the Biſhop, Grantor, nor any of his Predeceſſors.

William Whitton Clerk, Plaintiff, Sir Richard Weſton Defendant, in an Action of Debt.

The Caſe.

THe Prior of S. Johns of Jeruſalem, did hold certain Lands diſcharged of Tythes by reaſon of their order, Quandiu propriis manibus excolebant, the Statute of 31. of H.8. for diſcharging of Tythes is made, the 32. of H. 8. it was enacted that the King ſhould have to him his Heirs and Succeſſors, all the Lands, Priviledges, and Hereditaments of the ſaid Priory, the King dies, and the Lands by Meſne deſcents doe come to Queen Elizabeth, who grants the Land to Sir Henry Weſton Grandfather to the Defendant, who died ſeiſed, and the ſame deſcended to Sir Richard Weſton Father to the Defendant, and ſo from him to the Defendant: And, If the Land ſhould be held diſcharged of Tythes as the Prior held it? was the queſtion.

And I conceive that the Defendant ſhall hold the land diſcharged of Tythes in the ſame manner as the Prior held the ſame.

For the argument of which, two things are to be conſidered.

1. Whether the King or his Patentee ſhall have the ſame priviledge which the Prior had by the Statute of the 32. H. 8. or not?

2. Admitting that they ſhall not have this priviledge by generall words of this Statute, then, Whether they be diſcharged by the clauſe of the Statute of 31. of H.8. of Monaſteries, or not?

And I conceive that by each of theſe Statutes, or at leaſt by one of them, the King and his Patentees ſhall hold this Land diſcharged of Tithes, Quamdiu propriis manibus, &c.

And

And as to the firſt point I conceive that the Statute of the 32. of H. 8. hath ſufficient words to give this priviledge to the King, for it gives to the King not only all their Mannors, Lands, and Tenements, but alſo all their Priviledges belonging to them or to their Religion or Order, and this diſcharge of Tythes is a Priviledge belonging to their Religion or Order; for whereas Pope Paſcall did order that no Monk or religious Order ſhould pay Tithes, afterwards Pope Adrian did grant this priviledge, Solis Hieroſolimariis & Hoſpitulariis, Ciſterſienſibus & Templaribus, and did take away that priviledge from all other Orders: And I conceive it will not be denied, but that the Prior himſelf hath this priviledge, and if he had it, then it will follow that the King and his Patentee hath it alſo, for all their priviledges are given to the King.

But it may be objected, that theſe priviledges are given in reſpect only of their Order, and the Order being gone, the priviledge is gone alſo. Object.

I do agree that all perſonall priviledges concerning their Order are gone by reaſon of their diſſolution, but ſuch priviledges as concern the Land, and will make the Land moſt profitable to the King are remaining, and are given to the King for the intent of the Statute was to give it to the King in as ample and beneficiall manner, and with all ſuch priviledges concerning the Land, as they themſelves had. And although Tythes are not iſſuing out of the Land, nor ſhall be extended for unity of poſſeſſion of the land (as in the 42. Ed. 3. 13. Where a Prior having Tythes did purchaſe the Land and made a Feoffment, yet ſhall he have the Tythes, and ſo if a Parſon makes a Leaſe for yeares of his Glebe-land, yet he ſhall have Tythes thereof) yet the priviledge to hold the Land diſcharged of Tythes is a priviledge concerning the land, and is not like to the caſe of the appropriation of a Rectory to the Templars which was diſappropriate by the diſſolution of their Order, for the reaſon there is, becauſe the appropriation was made to a body corporate, which body being diſſolved, it is impoſſible they ſhould retain the ſame, and no body elſe can have it without a new appropriation or an Act of Parliament: and for Appropriations to Abbeys, &c. the clauſe in the 31. of H. 8. was neceſſary, for otherwiſe the Patentees of the King being Lay-people, and not capable of an Appropriation, they cannot have it but by ſpeciall proviſion by Act of Parliament, but any man may hold Land diſcharged of Tythes. Reſponſ.

But it may be again objected, that in the ſame Parliament an Act was made to revive temporall Liberties, Priviledges, and Franchiſes of Monaſteries, and therefore all thoſe had been loſt if it had not been for this Statute, and Spirituall priviledges are not revived by the Statute, and therefore they are gone. 2. Object.

The reaſon of making of this Act was, becauſe divers priviledges which they had, as Bona & Catalla Fellonum, &c. were extinct by the acceſſion to the Crown, and therefore it was neceſſary to revive them, but if the Statute had not been made yet ſhall the King have all thoſe Priviledges which were not extinct, as Parks, Chaſes, Warrens, Markets, Fairs, &c. Anſwer.

And that this priviledge is given to the King may be proved by a Proviſo in the Statute, whereby it is provided, that all priviledges of Sanctuaries before uſed or claimed in houſes, or other places commonly called S. Johns Hold, and all other Sanctuaries before uſed and appertaining to the ſaid Hoſpitall ſhall be void and of none effect, whereby it appears

pears, that if that Proviſo had not been made the priviledge of Sanctuaries had been in the King and his Patentees, in the ſame Manner as had been uſed before the diſſolution, and that by force of this word Priviledge, and yet this priviledge of Sanctuary does not concern the Land as diſcharge of payment of Tythes doth.

3. Object. But it may be again objected, that the Statute of the 31. H. 8. hath an expreſſe clauſe for diſcharge of the payment of Tythes, which needed not to have been if the generall words would have ſerved.

Anſwer. I anſwer that there were two reaſons to put this Clauſe into the ſaid Statute. 1. To induce purchaſers to buy the ſaid Land, and at a greater price. 2. For the infinite manners and means of diſcharge which the Abbots had, ſo that it would be very hard for Purchaſers to know them, and this appears in Coke. Rep. 2. Biſhop of Canterburies Caſe; but in our Caſe the means is very well known, and therefore ſuch clauſe was not neceſſary.

And as to the ſecond point, I conceive that the clauſe for diſcharge of the payment of Tythes doth extend to the poſſeſſion of this Priory, and yet I do agree that their Lands are given to the King not by the Statute of 31. of H. 8. but by the 32. of H. 8. And to prove this, the Statute of 31. H. 8. does extend to all Abbies, Priories, Hoſpitalls, and other Religious and Eccleſiaſticall houſes, and this Priory was Religious and Eccleſiaſticall, for they vowed Obedience and Chaſtity; and the caſe in the 27. H. 8. 16. in the caſe of Martin Dockwray, where it is holden that Fryers are dead perſons in the Law, be they of an Abby or any other Priory, and that appeares by the Statute of 32. of H. 8. of their diſſolution, by which it is enacted that the Fryers ſhall ſue and be ſued by their proper names, and that they ſhall have ſuch capacities, liberties, and freedomes as were given to other Religious perſons in an Act at the firſt Seſſion of this Parliament.

And in further proof hereof, divers Rectories were appropriate to them, and Tythes given to them, and they enjoyed them, and the Statute gives them to the King; by which it does appear that they were Religious and Eccleſiaſticall.

4. Object. But it may be likewiſe objected, that the Statute of the 31. of H. 8. does not diſcharge Chanteries, or Colledge lands given to King Edward the ſixth, of Tythes.

Anſwer. I anſwer, That the reaſon of that is, that becauſe Colledges, although they were Eccleſiaſticall, yet, they were not regular. And Coke 2. Rep. 48. B. but the Fryers of S. John of Jeruſalem were Eccleſiaſticall and Regular.

And it is not inconvenient that the King and his Patentees ſhould have the benefit of the clauſe of the Statute of 31. of H. 8. in thoſe lands given to the King by the Statute of the 32. of H. 8. as the Statute of Acton Burnell does provide, that if the Extender upon a Statute Merchant does extend the Lands too high, they ſhall anſwer this to the Conuſee, and the Statute of 23. H. 8. does order a new form of Recognizance to be taken before any of the cheif Juſtices, yet the Conuſee ſhall have the ſaid benefit of the Statute of Acton Burnell, although it was made two hundred years before the other Statute. And for Authority in this point, Dyer 277. The Prior of S. Johns of Jeruſalem, with the Fryers two or three years before the diſſolution did make a Leaſe of a Manor for years, which Leſſee did pay Tythes to the Church of Rocheſter proprietary, and after the diſſolution the King did grant the reverſion

of

of the Manor to one Scathome and to his Heirs, in ſuch ample manner as the Pryor had the ſame, &c. the Leaſe does expire, If he and his heirs having the Manor in their own poſſeſſion ſhal be diſcharged of Tythes or not, was the queſtion in Chancery, and on conſideration had of the Statute of the 31. of H.8. cap. 13. it ſeemed by the Lord Keeper Sanders, Southcott, and Dyer, that they be diſcharged untill they let the ſame out to others to Farm.

And Paſcha 11. Jac. in the Common Pleas, in the caſe of Weney, this caſe did come into queſtion, and argued by Coke, Warburton, Winch, and Nicholls, and they were divided in their Opinions.

Saturday the ſixth day of *June*, in the ninth year of the Reign of King *Charles*: Between *Francis Townley* Eſquire Plaintiff, *Edward Sherborne*, Executor of *Richard Mountford* deceaſed, Executor of *Thomas Challoner* deceaſed, Defendant.

Upon hearing and debating of the matter, as well on the fifteenth as the eighteenth of June laſt, the Court being aſſiſted with Mr. Juſtice Hutton, and Mr. Juſtice Jones, upon the Plaintiffs Bill of Review for the reviving and reverſall of a Decree made in a Cauſe wherein the ſaid Richard Mountford deceaſed, Executor of Thomas Challoner was Plaintiff againſt the now Plaintiff, and Thomas Foſter Eſquire, conſerning the ſumme of one thouſand ſeven hundred pounds, raiſed out of the Rents and Profits of certain Lands and Tenements in Linſted, Ardingley, and Worth in the County of Suſſex, in truſt for the ſaid Thomas Challoner during his Minority, and which the now Plaintiff by the Decree of this Court was to pay in caſe the ſaid Foſter ſhould fail to pay the ſame: ſeverall matters were offered by the Plaintiffs Councell for the reverſall of the ſaid Decree, as namely, that the now Plaintiff was decreed to pay the ſumme of one thouſand ſeven hundred pounds as raiſed out of the profits of the Infants Lands ſettled upon an account made up by the ſaid Forſter, with the ſaid Thomas Challoner the Infant, after he came to age, whereto the Plaintiff Townley was neither party nor privy, nor ever conſented nor ought to be bound thereby. And ſecondly, that the ſaid Plaintiff is by the ſaid Decree made lyable to the payment of all the profits raiſed out of the ſaid Infants Eſtate, whereas he never received any profits at all, and although he gave ſome Acquittances, yet the ſame were onely for the three firſt half yeares, and no more, and were but to ballance an account, the monies diſburſed amounting to as much as the Receipts, and there being three other Cotruſtees with him, the Plaintiffs Councell conceived that he ought not to be charged with more then he himſelf received, eſpecially for that the other parties truſted, and who received the profits were, or were reputed to be, men of ability, and reſponſible. Touching which laſt point, being that whereon the Plaintiffs Councell chiefly inſiſted for the reverſall of the ſaid Decree as againſt the now Plaintiff; It appeared unto this Court, that Challoner Father of Thomas the Infant, did heretofore make a Leaſe of the ſaid Lands to one Weeks for five and thirty yeares, and afterwards conveyed away the Reverſion to Thomas Challoner his Brother, and after the death of Francis (according to an Award made between the ſaid Weeks and Thomas Challoner the Brother, who was

Uncle to Thomas the Infant) the Leaſe of five and thirty years, and the Reverſion in Fee-ſimple were to be aſſigned to parties truſted by the ſaid Weeks, and one Barbara Challoner, Mother of the ſaid Infant, and by the ſaid Thomas the Uncle, the Leaſe to be intruſt for Weeks for life, the remainder to Barbara for life, the remainder to Thomas the Infant, and the reverſion in fee to be in truſt for the ſaid Thomas the Infant. But upon the limitation or Condition that the ſaid Thomas the Infant when he came of age ſhould make ſome aſſurance to Thomas the Uncle according to the Award, wherein if he failed, then the truſt limitted to him ſhould ceaſe, and the Truſtees ſhould be ſeiſed for Thomas the Uncle. In purſuance whereof the now Plaintiff and the ſaid Forſter were truſted together with one Langworth and Lovell to take the Eſtate in the Leaſe, and did take an Aſſignment thereof from Weeks the 12th. of June, 9. Jacobi: And all the Truſtees ſealed the Counterpart, and the ſame day the now Plaintiff and Forſter aſſigned their moyity in the ſaid Leaſe to one Mr. Peacock and Robert Forſter, who were not privy nor acquainted therewith, and on the thirteenth of June, the ninth of King James, the ſaid Thomas Challoner the Uncle paſſed over the Inheritance to the now Plaintiff and Thomas Forſter, whereby it was probable that the ſaid Aſſignment made by the now Plaintiff and Thomas Forſter, of their intereſt in the moyity of the Leaſe, was to keep the ſame from being extinguiſhed. After which aſſurance ſo made, Weeks, during his life, and Barbara after him during her life received the profits of the ſaid Lands, and Barbara in the year of our Lord 1614. dyed. And it appeared that ſoon after the death of the ſaid Barbara, viz. 23. of March, 12. Jacobi, Langworth one of the Truſtees of the Leaſe being dead, whereby his intereſt in the moyety ſurvived to Lovell, that Thomas Challoner the Uncle procured the ſaid Lovell to aſſign over his intereſt in the ſaid Leaſe, to the ſaid Thomas Challoner the Uncle, lyable to the ſaid truſt, as by a Copy of the Aſſignment now read appeared. And it appeared by the confeſſion of the now Plaintiff, and by his anſwer to the former Bill, and by the Acquittances now produced that the now Plaintiff joyned with the ſaid Thomas Forſter in giving acquittances for the three firſt half years Rents, but it did not appear that he ever received any after, or gave any more Acquittances, but it doth appeare by the proofs, that the ſaid Thomas Challoner the Uncle, who had the Aſſignment from Lovell, did receive the Rents of the Tenants, and payd the ſame over to the ſaid Thomas Forſter, and that when the Infant came of age, he called the ſaid Thomas Forſter, and Thomas the Uncle to an account, and that they did account: And that the ſaid Thomas Forſter did then deliver him a Book of account, which the Defendant now produced in Court, by which it did appear, that for the three firſt half years the Rents were received by the ſaid Thomas the Uncle, and by him paid to the now Plaintiff, and the ſaid Thomas Forſter for the uſe of the Infant, but for all the ſubſequent time the ſame were received by the ſaid Thomas Challoner the Uncle, and by him paid to the ſaid Thomas Forſter alone, who (as was not now denyed) was at the time of ſuch receits generally taken to be of great ability and reſponſable, as it alſo appeared by the proofs, that the ſaid Infant after he came of age, had declared the ſaid Thomas Forſter to be his Debtor, and did by his Will read in Court, give the ſaid ſumme of one thouſand ſeven hundred pounds to the ſaid Mountford as a Debt owing by the ſaid Thomas Forſter ſolely, not mentioning the now Plaintiff. Upon all which this Court was fully ſatisfied, that the now Plaintiff received no penny of profits

after

after the three firſt half years: but whether he ought to be charged with all that the ſaid Thomas Forſter received, being a Co-truſtee with him, in reſpect the ſaid Forſter is now declined in his Eſtate (as is conceived) this Court ſomewhat doubted: and although a preſident was produced, wherein this Court had charged parties truſted but onely according to their ſeveral and reſpective receits, and not one for the other; yet in reſpect the Defendants Councel oppoſed the ſame, alledging many preſidents to be on the other ſide, and the Lord Keeper conceived the caſe to be of great conſequence, and thought not fit to determine the ſame ſuddenly, but to adviſe thereof, and deſired the Lords the Judges aſſiſtance to take the ſame into their ſerious conſiderations, and to aſſiſt him with their advice therein, whereby ſome courſe might be ſettled that parties truſted might not be too much puniſhed, leſt it ſhould diſhearten men to take any truſt, which would be inconvenient on the one ſide; nor that too much liberty ſhould be given to parties truſted, leſt they ſhould be emboldened to break the truſt impoſed on them, and ſo be as much prejudicial on the other ſide. And the Lord Keeper, and the Lords the Judges aſſiſtants afterwards conferring together, and upon mature deliberation concerning the caſe, to be of great importance, his Lordſhip was pleaſed to call unto him alſo Mr. Juſtice Crook, Mr. Juſtice Barcley, and Mr. Juſtice Crawley, for their aſſiſtance alſo in the ſame; and appointed preſidents to be looked over, as well in this, as in other Courts, if any could be found touching the point in queſtion; whereupon ſeveral preſidents were produced before them, ſome in this Court, and ſome in the Court of Wards, where parties truſted were chargeable onely according to their ſeveral and reſpective receits, and not one to anſwer for the other; but no preſident on the contrary was produced to them. Whereupon his Lordſhip, after long and mature deliberation on the caſe, and ſerious advice with all the ſaid Judges, did this day in open Court declare the reſolution of his Lordſhip and the ſaid Judges: That where Lands or Leaſes were conveyed to two or more upon truſt, and one of them receives all or the moſt part of the profits, and after dyeth or decayeth in his Eſtate, his Co-truſtees ſhall not be charged, or be compelled in this Court, to anſwer for the receits of him ſo dying or decayed, unleſs ſome purchaſe, fraud or evil dealing appear to have been in them to prejudice their truſt; for they being by Law Joyntenants or Tenants in common, every one by Law may receive either all or as much of the profits as he can come by: And it being the caſe of moſt men in theſe days, that their perſonal Eſtates do not ſuffice to pay their debts, prefer their children, and perform their Wills, they are enforced to truſt their friends with ſome part of their real Eſtate, to make up the ſame, either by the ſale, or perception of profits: and if ſuch of theſe friends, who carry themſelves without fraud, ſhould be chargeable out of their own Eſtates for the faults and deficiencies of their Co-truſtees, who were not nominated by them, few men would undertake any ſuch truſt. And if two Executors be, and one of them waſte all, or any part of the Eſtate, the Devaſtavit ſhall by Law charge him onely, and not his Co-executor: and in that caſe, Equitas ſequitur Legem, there having been many preſidents reſolved in this Court, that one Executor ſhall not anſwer nor be charged for the act or default of his companion. And it is no breach of truſt, to permit one of the truſtees to receive all or the moſt part of the profits, it falling out many times that ſome of the Truſtees live far from the Lands, and are put in truſt

truſt out of other reſpects then to be troubled with the receit of the profits. But his Lordſhip and the ſaid Judges were of opinion, that if two Truſtees were, and one of them without warrant of the party that truſteth him, or of a Court of Equity, aſſigneth his Eſtate, and the Aſſignee doth receive the profits, and becometh non-ſolvent, he that made the Aſſignment ſhall anſwer it for him, but the other original Truſtee ſhall anſwer for no more then what he receiveth himſelf, becauſe the Aſſign cometh not in by him, or his aſſent or appointment: and that in caſe, if the original Truſtee, that did not make the Aſſignment, receive the whole profits, and become non-ſolvent, neither the Aſſignor nor the Aſſignee ſhall be anſwerable for them: and if an Obligation be made to two in truſt, and one of them releaſe the whole debt, as by law he may, this ſhall not charge his companion for any part: and albeit in all preſumption this caſe hath often happened; yet no preſident hath been produced to his Lordſhip or the Judges, that in any ſuch Caſe the Co-truſtee hath been charged for the act or fault of his companion: and therefore it is to be preſumed, that the current and clear opinion hath gone, that he is not to be charged (it having not till of late been brought in queſtion) in a caſe that by all likelyhood hath frequently happened. But his Lordſhip and the ſaid Judges did reſolve, that if upon the proofs or circumſtances the Court be ſatisfied, that there be Dolus malus, or any evil practice, fraud or ill intent in him that permitted his companion to receive the whole profits, he may be charged though he received nothing. And his Lordſhip and the ſaid Judges did declare, that in this particular Caſe, they did not finde any material proof againſt Mr. Townley, to make his caſe worſe then the general caſe aforeſaid, but rather better (except onely for the three half years Rent, which he joyned in acquittance with Mr. Forſter, for the receit of the profits alone by Mr. Forſter is no breach of truſt in Mr. Townley: and Mr. Challoner, when he came of full age, took Mr. Forſter for his Debtor. And therefore it is ordered and decreed, That ſo much of the ſaid Decree as chargeth Mr. Townley with any more of the profits then the three half years, for which he joyned in acquittance, ſhall be reverſed: but as for thoſe three half years profits, if the ſame were not diſburſed or imployed for the uſe of Mr. Challoner, then for ſo much thereof as hath not been ſo diſburſed or imployed, the ſaid Complainant Mr. Townley ought to be anſwerable, and the Defendant may call the Plaintiff before Mr. Page, one of the Maſters of this Court, to audite the account touching theſe three half years, if any difference be thereabouts. And laſtly, it is ordered, that the Recognizances given on the Plaintiffs part, to perform the Order of this Court, be diſcharged.

Trinit.

Trinit. 13 Jacob. Allen againſt Wedgwood.

IN an Action of Debt on a Bond of 100 l. made the 23 of April 1610. The Defendant demands Oyer of the Obligation and Condition, which was, That if the Defendant did perform all and every ſuch Article and Articles of Agreement, and every parcel and particular point thereof, being dated the day of this Obligation taken between the Defendant and Plaintiff, with the conſent of both parties, concluded and agreed upon, and ſealed with the ſeal of the Defendant, that then the Oligation to be voyd. And he demanded alſo Oyer of the Articles, which were as followeth.

Memorandum, It is agreed between the Defendant of the one part, and the Plaintiff of the other part; and the Defendant doth condeſcend and agree for him, his Heirs, Executors, Adminiſt. &c. with the Plaintiff, his Heirs, Executors, &c. in manner and form following.

Impr. The Defendant, for him, his Heirs, &c. doth demiſe, ſet, and to farm let, to the Plaintiff, his Heirs, Executors, &c. the Mannor-houſe, or Meſſuage, called Sowdley Hall, with all the Lands which were ſometimes in the Tenure of Reynold Sowdley, with all the appurtenances thereunto belonging, being in great Sowdley in the Pariſh of Choſen-dine in the County of Salop. 1.

Item, The Defendant is to make a Leaſe of the ſaid Mannor for term of three lives, to the Plaintiff or his Aſſigns, and they to enter after the expiration of ſuch Leaſe or Leaſes as are lawfully made by John Sowdley, if any be. 2.

Item, If there be any Leaſe or lawful bargain made thereof, that then at the expiration thereof the Plaintiff is to nominate the names of three ſuch perſons as ſhall be expreſſed in the aforeſaid Leaſe, which is to be made to the ſaid Plaintiff by the ſaid Defendant. 3.

Item, If there be none made thereof, that then the Plaintiff is to enter upon the ſaid Mannor at the Anunciation, 1612. 4.

Item, The Plaintiff is to have and enjoy the ſame, paying yearly, during the three lives, for, and according to the Rent it was ſet for, in the time of the Father of John Sowdley. 5.

Item, The Plaintiff is to pay the Defendant, when the ſaid Plaintiff or his Aſſigns ſhall enter upon the ſaid Mannor, 20 l. for a fine. 6.

Item, The Defendant may at any time, ſo long as he is unmatryed, reſort unto the ſaid Mannor, at ſuch time as the Plaintiff ſhall inhabit there, or have the profit thereof, and finde good entertainment, for himſelf, his boy, and his horſe. 7.

Item, The Defendant is to deliver the ſaid houſe to the Plaintiff, with all the appurtenances thereto belonging, or in any wiſe appertaining, Tenantable and in good repair. 8.

Item, The Defendant is to make as good a Leaſe, as can be deviſed by Councel, unto the Plaintiff and his Aſſigns. 9.

And the Defendant pleaded performance of theſe Articles. Plea.

The Plaintiff did reply, that the ſaid 23 of April, 1610. there was not any Demiſe made by the ſaid John Sowdley of the ſaid Mannor-houſe, and of the houſes called Sowdley Hall, and of the Land lately in the Tenure of the aforeſaid Reynold Sowdley: and that the Plaintiff, Replication.

tiff, ſince the making of the ſaid Articles, viz. 9 Maii 10 Jacob. at great Sowdley aforeſaid, did require the Defendant to make a Leaſe of the ſaid Pannor-houſe and houſes, with the aforeſaid Land, late in the Tenure of the ſaid Reynold Sowdley, ſcituate in great Sowdley aforeſaid, in the Pariſh aforeſaid, and in the County aforeſaid, to one Walter Welden, Thomas Welden, and John Welden, for their lives, according to the effect of the ſaid Articles: and that the ſaid Walter, Thomas, and John, were there and then ready to accept of the ſaid Demiſe of the premiſſes of the Defendant, and yet the Defendant did refuſe to make the ſaid Demiſe of the premiſſes to the ſaid Walter, Thomas, and John.

Demurrer. Upon which the Defendant demurred in Law.

And I conceive that the Plaintiff ought to have Judgment.

And firſt, to anſwer the Objections that are made againſt the Plaintiff upon the Articles.

Object. 1. That the Leaſe ought to have been made to the Plaintiff himſelf for three lives, and not to any other.

Anſwer. I anſwer, The words are plain, That the Leaſe ſhall be made to the Plaintiff or his Aſſigns in the diſjunctive: and therefore it is in his election either to take the Leaſe to himſelf for three lives, or to take it to his Aſſigns for three lives; and ſo ſhould it be, if the words were to the Plaintiff and his Aſſigns, as it is reſolved in the Comment. fol. 288. Chapman againſt Dalton: where a man did let Land to another, and did covenant at the end of the term, to make ſuch another Leaſe to the Leſſee and his Aſſigns; the Leſſee made his Executor, and dyes; and the Executor does make his Executor, and dyes: and there it was adjudged, that the Leaſe ought to be made to the Executor of the Executor, for he is the Aſſignee in Law to the firſt Teſtator: and the word [and] ſhall be taken for the word [or] and there it is clearly agreed, that if the Leſſee had named any in his life-time to take the ſaid Leaſe, it ought to be made to him: and ſo (as it is there ſaid) if I be obliged to make a feoffment to you or your Aſſigns, ſuch as you name to take the feoffment, are your Aſſigns indeed: and ſo in our Caſe, theſe three perſons named by the Plaintiff are his Aſſigns, to whom the Leaſe ought to be made, 21 Ed. 3. 29.

Object. 2. The other Objection is, that the Leſſee named by the Plaintiff ought to be ready upon the Land to take the Leaſe; for a Leaſe for life cannot be made off the Land.

Anſwer. I anſwer, That when a man is bound to infeoff the Obligee, and no time is limited, he ought to do this upon requeſt, 27 H. 8. 6. B. and the ſame Law of a feoffment upon condition to re-infeoff him, 44 Ed. 3. 9. 14 H. 8. 21. 18 Aſſiſ. 18. 17 Aſſiſ. 20. but yet the Obligor at his peril ought to do it during his life, otherwiſe the condition is broken.

So in our Caſe, the Plaintiff ought firſt to require the Defendant to make the Leaſe, and this of neceſſity ought to be done where he can finde the Defendant, for it is impoſſible to do it on the Land, unleſs the Defendant be there, and the Plaintiff cannot compel him to be there: But when the Plaintiff hath made his requeſt, the next action is then to be done by the Defendant; and therefore he ought to go to the Land, and to be ready there to make the Leaſe. And in the 22 Ed. 4. 43. A. is bound to B. on condition that C. ſhall infeoff B. by ſuch a day, and did ſhew that C. was there ready on the Land, and B was not there to receive the Feoffment: and there it was argued, whether the

iſſue

iſſue ſhould be, upon the being of C. upon the Land who ought to make the Leaſe, or of B. who was to take the Leaſe; and in fine it was adjudged, that the iſſue ſhould be, whether C. were there or not: for he ought to be there, or elſe the Bond was forfeit. So that the Defendant upon requeſt ought to go to the Land, and there to attend a convenient time to make the Eſtate; and then if the perſons named do not come thither, he is excuſed; but when he goes not to the Land, but does utterly refuſe to make the Eſtate, it is to no purpoſe for the Aſſigns to come to the Land: and admitting the Law would enforce them to attend there, then I demand how long they ought to attend? for in all places where the attendance of one is required in a place certain by the Law, the time of his attendance is limited, 18 and 19 Eliz. Dyer 354.

The third Objection is, that the Article for making of the Leaſe, is to make a Leaſe of the ſaid Mannor, whereas no Mannor is mentioned before; and the requeſt is, to make a Leaſe of the houſes and of the Land, late in the Tenure of Randolph Sowdley. 3. Object.

To this I anſwer, That the Demiſe in the firſt Article, is of the Mannor-houſe and all the Lands, which were in the Tenure of Randolph Sowdley, with all the appurtenances thereto belonging; then when he agrees to make a Leaſe of the ſaid Mannor, it ſhall be intended the Mannor mentioned before: and although it be not in verity a Mannor, yet in reputation it may be a Mannor, and that is enough to make it to be put in the agreement. 22 H. 6. 39. a. where one pleaded a Feoffment of eight Acres of Land by the name of the Mannor of D. and adjudged by the Court to be a good Feoffment, although the acres were not ſet forth: and in the 27 of H. 6. 2. a Plough-land may paſs by the name of a Mannor. Anſwer.

The requeſt is made too late, for the time limited to enter is the Annunciation, 1612. and the requeſt is not until the ninth of June next after, and that is too late; for the Leſſor ought to have 20 l. fine upon the entry and making of the Leaſe, and therefore the requeſt ought to be made at the time that the entry was to be made: and for that purpoſe Andrews Caſe, and the Lord Cromwels Caſe in L. Cooks Rep. were cited. To which Objection Cook and all the Court did ſeem to incline. 4. Object.

But I conceive that the requeſt is made in good time enough, for two Reaſons. Anſwer.

The Eſtate here is to be made by the Defendant; and although he be not bound to do it without requeſt, yet may he do it, or at leaſt he may offer to do it, without any requeſt: and therefore if there be any loſs in the not doing of it, it is his own fault, becauſe he did not offer to make the Eſtate, and is not the Plaintiffs fault; and if he had offered to make the Eſtate, and the Plaintiff had refuſed, he had been excuſed. 1.

And therefore the rule is given in the Lord Cromwels Caſe aforeſaid, that when a woman or a Grantee upon condition is to make an Eſtate to the Grantor, and no time is limited, he hath time for his life, unleſs the party who is to have the Eſtate do haſten it by requeſt: but if an advowſon be granted on ſuch condition, the Regrant ought to to be before the Church becomes void: ſo, if the condition be to grant Rent payable at certain days, the Grant ought to be before any day of payment; for otherwiſe he ſhall loſe the Preſentation, and the Rent which will incur before the Grant made. And in the 14 Ed. 3. Debt.

138. In a Debt upon a Bond, the Defendant pleaded the Condition, viz. That if he granted twelve marks Rent, the Bond should be void, and demanded Judgment, &c. because no time was limited, so that he might do it when he would; and said, that he was always ready to grant the twelve marks Rent: and because he demurred not, issue was joyned, &c.

2. If this not making request, shall be any damage to the Plaintiff, it must be because the Defendant suffers loss by it, as in the cases above cited; but in this case the Defendant hath the same remedy for the 20 l. although no Estate be made, as he should have had if the Estate had been made; for by the fourth Article it is agreed, that if there be no Estate made of the Land, the Plaintiff shall enter at the Annunciation, 1612. And I conceive that this payment ought to be made at the time limited for the entry; for it is a mutual agreement that doth binde both parties: and therefore it lies not in the power of the Plaintiff, for his want of entry, to defeat the Defendant of his 20 l. agreed to be payd to him: but when he enters, it shall be intended that he entered when it was agreed he should enter, viz. at the Annunciation, 1612. And if he payd it not then, the Defendant might have had his Action of Covenant, whether any Lease were made or not. And in Sir Andrew Corbets Case, Cook. Rep. 4. 81. certain Land is devised to A. B. until 800 l. pound be levyed, that is until it may be levyed: and so in case of a Lease or limitation of a use; for otherwise it should be in their power to hold out the Lessor for ever: and so in case of an Elegit upon the Statute of Westm. the 2d. cap. 18. and of Retinue for the double value of a Marriage by the Statute of Merton, cap. 6.

Opinion of the Court. And the whole Court was of Opinion, that the request came too late: whereupon they were of Opinion to give Judgment against the Plaintiff: but I prayed, that the Plaintiff might discontinue his Suit, which was granted.

Rot. 609. ## Michaelmas, 13 Jacob. Smalman, Plaintiff, against John Agborrow and Edmund Agborrow, Defendants.

IN an Action of Trespass; for that the Defendants, the 13 Maii, 13 Jacob. six Heifers of the Plaintiff of the price of 20 l. at Dodenham, in a place called Well-Marsh, did take, chase, and drive away, to the damage of 20 l. &c.

The Defendants to all, except the chasing, did plead Not guilty.

And as to the chasing, they said that the place where, &c. is, and at the time wherein, &c. was the Freehold of one Francis Agborrow, and so did justifie as his servants, for damage feasant, &c.

Replication. The Plaintiff replyed, that before the said Francis Agborrow had any thing, &c. the Dean and Chapter of the Cathedral of St. Mary the Virgin, in Worcester, were seised in fee of the Manor of Aukerden and Dodenham, whereof the place where, &c. is, and at the time whereof, &c. was parcel, &c. And that the 25 of November, 10 Elizab. the said Dean and Chapter, by their Indenture, did Demise the said Manor to William Agborrow, and Jane his Wife, and to the said Francis Agborrow for their lives: And that the 20 Febru. 39 Elizab. William Agborrow dyed seised:

And

and that the 21. of Decemb. 39. Eliz. Jane did marry with Robert Hawkins. And that the 25. Febr. 40. Eliz. Robert Hawkins, , and the said Jane by their Indenture did demise the said Mannor to William Hawkins and William Heaven for sixty years from the date, &c. if the said Jane and Francis Agborrow or either of them should so long live, rendring twenty pounds rent, and that the 25. of Mar. 13. Jac. William Hawkins and William Heaven did grant their Estate to the Plaintiff, whereby he was possessed and put in his Cattel there to grase, which were there untill the Defendant took them away, &c. And did aver the life of Francis Agborrow.

The Defendants rejoyn and say, that the said Jane did die the 14. of Mar. 12. Jac. and that Francis Agborrow did hold himself in, &c. Per jus accresendi. Rejoynder,

Upon which the Plaintiff demurred in Law.

A man and a woman are Joynt-tenants for life, the woman marries, the Husband and Wife by Indenture do let their moyety for years, rendring Rent, and after the woman dies. The Case.

And the question was, whether the surviving Joynt-tenant could avoid this Lease.

And I conceive he cannot.

And for the Argument of this Case, I shall observe these two things thereof.

That if the woman who made this Lease had been sole at the time of the making, this Lease had been good during her life, and the life of her Companion the other Joynt-tenant. I.

That this Lease being made by the Husband and Wife, is not void, but voidable. II.

And as to the first Point, Littleton fol. 63. and 64. saies, that if two Joynt-tenants in Fee be, and one grants a Rent-charge and dies, the Survivor shall hold the Land discharged; but if one makes a Lease for years and dies, the Lease is good against the Survivor: and in Hales Case in the Comment, If two Joynt-tenants be for years, and one of them does grant to I.S. that if he payes twenty pounds at Michaelmas, he shall have his moyety, and the Grantor dies, and I. S. does pay the money, yet shall not he have the Land, because the Condition precedes the Estate, but if he make a Lease for yeares to commence at a day to come, and dies before the day, yet is the Lease good against the Survivor: and so in Trin. 37. Eli. Harbury and Bartons Case. Two Joynt-tenants are for life, and one lets his moyety for years to commence after his death, and dies, and agreed to be a good Lease against the Survivor: for as Litton saith, every Joynt-tenant is seised Per my & per tout, and hath an Estate in one moyety not only for his own life, or his own time, but also for the time and life of his Companion, and therefore every Estate made by him is good for a moyety so long as the Estate of himself and his Companion continues, but a Rent-charge shall not bind his Companion, because he claimes by the first Conveyance which is above his Companions Estate. 1. Part.

And as to the second point, it is cleer that when Husband and Wife make a Feoffment in Fee, or a Lease for years of the Land of the Wife rendring Rent, the Wife after the death of her Husband may accept the Rent, and make the Lease good; as in 26. H. 8. 2. the case of the Feoffment is agreed, and if a Woman after the death of her Husband does accept the Rent, she shall be barred in a Cui in vita, 11. H. 7. 13. 15. Ed. 4. 17. and Dyer 91. B. Husband and Wife make a Lease for years 2. Part.

by Indenture, and the Husband dies, and she accepts the Rent, she shall be bound thereby and shall not avoid the Lease.

Upon which two things being (as I conceive) unquestionable, it follows that this Lease at the time of the making thereof, is not void but voidable. And therefore the sole question will be, how this Lease is voidable, and if it may be avoided by the surviving Joynt-tenant, or not?

And I conceive that it is avoidable by the Wife only, if she survive her Husband, and not by the other Joynt-tenant, and that for two reasons.

First, Because the Survivor comes in above the Lease, and therefore cannot take advantage of any imperfection or defect to avoid the Lease, 14. Ed. 41. B. If a Feoffment or a Lease for life be made to two, and one dies, the other may plead the Estate to be made to him only, for he is not in by him that is dead, but by the Feoffor or Lessor, : and Dyer 187. a. Two Joynt-tenants for life, one makes a Lease for yeares rendring Rent, and dies, the Survivor shall not have the Rent. And if Tenant for life makes a Lease for years rendring Rent, and surrenders to the Lessor, the Lessor shall not have the Rent, for he is in by his Reversion which is above the Lease for years: and 28. H. 8. 96. a. An Executor had Judgment to recover a Debt, and died intestate, whereupon Administration is committed to another, he shall not have a Scire facias upon this Judgment, because that he being Administrator immediately to the Testator is above the recovery.

Secondly, There is no privity between the surviving Joynt-tenant and the Lessor, to make him avoid the Lease which is voidable, as in 8. Rep. Whittinghams case, Privies in blood, as Heir generall or speciall shall avoid a voidable estate made by the Ancestor, as if an Infant make a Feoffment in Fee, his Heir may well enter and avoid the Feoffment: but Privies in Law, as Lord by eschear, Lord of a Villain, or Lord who enters for Mortmain, shall never take benefit of the Infancy, because they are but strangers. And therefore if an Infant make a Feoffment in Fee, and dies without Heir, the Feoffment is unavoidable, 49. Ed. 3. 13. 6. H. 4. 3. 7. H. 5. 9. 39. H. 6. 42. And as to Privies in Estate, as Joynt-tenants, Husband and Wife, Donor, in Tail, and Donee, Lessor and Lessee, it is there also resolved, that they shall not take advantage of Infancy, unless it be in some speciall cases. And therefore if Tenant in Tail within age makes a Feoffment in Fee, and dies without Issue, the Donor shall not enter, contrary to the opinion of Rick and Frisby, 6. H. 4. 8. 9 because that here is only a Privity in Estate between them, and no right does accrue to the Donor by the death of the Donee; so if two Joynt-tenants in Fee be, and one of them being within age makes a Feoffment in Fee, and dies, the Survivor shall not enter; but if two Joynt-tenants within age do make a Feoffment, one joynt Right remains in them, and therefore if one dies, the Right will survive, and the Survivor may enter in all, and the same Law of Covertue, or non sanæ memoriæ, as it is said also in Whittinghams case: and in Fitzherb. N. B. 192. K. If two Joynt-tenants within age do alien in Fee, they must sue severall Writs of Dum fuit infra ætatem, because that the cause of their Action is their nonage, which is severall, for the nonage of the one is not the nonage of the other. But if Husband and Wife within age do make a Feoffment of the Wifes land, and the Husband dye, the Wife shall have a Dum fuit infra ætatem, 14. Ed. 3. Dum fuit infra ætatem, 6. and 12. H. 7. 18. B. Kelloway: In a Formedon by the Lord Brook against the Lord Latimer, if an Infant does make a Feoffment,

none

none ſhall avoid this but the Infant himſelf and his Heirs, and no ſtranger, and the ſame Law of a Feme Covert.

And as to the caſe of Harvey and Thomas, 33. Eliz. cited in the Lord Cromwells caſe, Where the Husband made a Leaſe of his Wifes Land for years, and then he and his Wife alienes by Fine, and the Husband dies, the Conuſee ſhall avoid this Leaſe, which I agree to: for the Leaſe being made by the Husband only, is utterly void againſt the Wife, and cannot be made good by any Act done by the Wife, and the Land paſſeth all from the woman by the Fine, and therefore the Leaſe cannot bind the Conuſee.

The Survivor in one caſe cannot make the Leaſe good by the acceptance of the Rent, becauſe that the Rent does not belong unto him, and therefore he ſhall not be received to avoid this Leaſe, as in Nat. B. 138. B. the Heir ſhall not have a Ceſſavit for ceaſing in the time of his Anceſtor, for he ſhall not have the Rent or the arrearages incurred in the life of his Anceſtors, and the reaſon is as I conceive, becauſe that the Law does give this benefit to the Tenant for the ſaving of his Tenancy for the tender of arrearages, the which cannot be to the Lord, becauſe that the Rent is not due to him, and therefore the Lord ſhall loſe his action rather then the Tenant ſhall be deprived of his advantage of ſaving the land by his tender: And by this caſe alſo, the Aunt and the Neice ſhall not joyne in a Ceſſavit, for a ceaſing made before the Title of the Neice accrued, but in Nat. F.B. 139. it is otherwiſe there of joynt-tenants, as I conceive, the reaſon whereof is, becauſe, as I conceive, the Survivor ſhall have all the Rent, and therefore the tender may be made to him, 13. H. 4. 17. B. If one makes a Feoffment in Fee rendring Rent upon condition to re-enter for non-payment, and dies, the Rent being arrear, the Heir cannot demand the Rent or enter for non-payment, becauſe that the Rent is not due to him, and as he cannot diſpence with the Condition for acceptance of the Rent, ſo cannot he enter for non-payment thereof. 3.

And I argued this Caſe again on Fryday, being the firſt day of Trinity Term, 14. Jac. 31. Maii, at which day, Daſton did alſo argue for the Defendant, but the Court did not then give any direct Opinion, but ſeemed to incline very much for the Plaintiff. And Hil. 14. Jac. the caſe was argued by Chilborne Serjeant, for the Plaintiff, and Davenport for the Defendant; at which time all did agree, that the Leaſe continued: But Davenp. took exceptions to the replication, For he ſaid, that the marriage of Jane with Rob. Hawkins is alledged to be 21. of No. 39. Eli. and the death of William Agborrow her firſt Husband, the 20. of Febr. 39. Eliz. which is after the marriage; but that was held not materiall, for it is ſaid, that William Agborrow died the twentieth of Febr. 39. Elizab. and that afterwards, viz. the one and twentieth of Novemb. 39. Eliz. Jane did marry Thomas Hawkins, ſo that the [afterward] is ſufficient, Trin. 37. Eliz. Rot. 206. Butler againſt Wallis: In a Treſpaſſe the Defendant juſtified by vertue of an Extent upon a Statute, and did ſhew the Extent, and that the 28. of Febr. a Liberate was awarded by vertue whereof the Sheriff the 27. of Octob. delivered the land to him, &c. yet adjudged ſufficient, for when he ſaid Virtute brevis, the miſtake of the day afterward is not materiall.

And at laſt in the ſaid Term of S. Hillary, all the Court agreed that the Leaſe continued good againſt the Survivor, and cannot be avoided by him, and that the acception to the pleading was not materiall: And thereupon Judgment was given for the Plaintiff. Judgment.

Paſch.

Rot. 668. **Paſch. 11. Jacob. Between Thomas Palmer Knight, Plaintiff, Richard Greenwill, and Edward Greenwill, Executors of John Greenwill Defendants.**

IN an Action of Debt on a Bond of fifty pound, entred into by the Teſtators the 20. of Novemb. 5. Jac. The Defendant demanded Oyer of the Bond and Condition, which was, that if the Teſtator his Heires Executors and Aſſignes, did perform all the Covenants compriſed in certain Indentures, bearing date with the Obligation made between the Plaintiff on the one part, and the Teſtator of the other part, that the Obligation ſhall be void. And the Defendant pleaded, that the Plaintiff by the ſaid Indenture did let to the Teſtator a Houſe and the moyety of his land, amounting to about thirty Rods of land in Pollicote to have, &c. from Michaelmas laſt paſt, for ſeven years, rendring twenty pounds Rent, and ſhewed that the Teſtator did covenant by the ſame Indenture for him, his Executors and Aſſignes, with the Plaintiff his Heires and Aſſignes, within two years after the beginning of the ſaid Leaſe, to deliver or cauſe to be delivered to the Plaintiff or his Aſſigns, a Map or Plot made in diſtinct manner by men of skill, as well of all the land in little Pollicot, as was then in his occupation, and in the occupation of Thomas Cocker and John Crooke, parcell of the Demiſe of the Plaintiff in Pollicot aforeſaid, as of all the land in the occupation of the Teſtator by a leaſe of Lincoln Colledge in Pollicot aforeſaid, which are all the Covenants, &c. And pleaded that the Teſtator in his life time, and the Defendants after his death had performed all the Covenants, &c.

Replication, The Plaintiff replied, that the Teſtator within two years after the beginning of the Leaſe, did not deliver or cauſe to be delivered to the Plaintiff or his Aſſignes, a Map or Plot made in diſtinct manner by Surveyors and men of skill, of all the land in little Pollicot aforeſaid, in his occupation, and in the occupation of the ſaid Thomas Cocker and John Crooke parcell of the aforeſaid Demiſe of the Plaintiff in Pollicot aforeſaid, Secundum formam & effectum Indenturæ prædict.

Upon which Replication the Defendants demurred in Law.

And I conceive Judgment ought to be given for them againſt the Plaintiff.

Firſt, the Plaintiff replies, that the Teſtator did not deliver the Plot, and it may be that it was delivered by the Defendants who were his Executors, which is a good performance of the Covenant, and if ſo, then the Plaintiff has no cauſe of action, and where the matter is left doubtfull in the Replication, it ſhall be taken moſt ſtrongly by the Plaintiff who pleads it. And in the Comment. 104. a. Fulmerſtone againſt Steward. If a man be bound to pay twenty pounds about Chriſtmas, it is no plea for him to ſay he hath paid it, but he muſt ſhew when, or otherwiſe it ſhall be intended that he paid it after the Feaſt and before the Suit. And ſo in a Dum fuit infra ætatem if the Tenant do plead a Releaſe of the Demandant, it is no plea without ſaying that he was of full age, for the plea ſhall be taken moſt ſtrong againſt himſelf, and that is, that it was made when he was within age: and 3. H. 7. 2. If the Defendant in a Treſpaſſe does plead a releaſe, it is not ſufficient without ſhewing that it was made after the Treſpaſſe, for otherwiſe it ſhall be taken to be done before.

And

And 26.H.8. Pleading 147. If in a Precipe quod reddat, the Tenant does plead Warranty collateral of the Anceſtor of the Demandant, and he replies that he entred, and ſo does avoid the Warranty, it is not good without ſaying that he entred in the life of the Anceſtor, for otherwiſe it ſhall be intended that he entred after the deſcent of the Warranty, and in Dyer 89. and 96. The Plaintiff in an Ejectment declared on a Leaſe for years to begin at Michaelmas after the death of Thomas Boydon and M. his Wife, and ſet forth, that they died, and he entred, and adjudged inſufficient, for it might be that he entred after this death, and before Michaelmas, and Dyer 28.H.8.27. A Covenant that the Leſſee and his Aſſigns ſhall pay all Rents, pleading that the Leſſee hath paid them is not ſufficient, becauſe the Aſſignes are omitted.

(In his Occupation) are words uncertain, ſc. whether they ſhall be referred to the Plaintiff, who is laſt named, or to the Teſtator, 7 H.7. & 7.Ed.6. Dyer 84 a. In a Treſpaſſe brought by the Husband and Wife, for breaking their Cloſe & bona ſua capt. and pleaded of a Treſpaſſe made to the Woman Dum ſola fuit, for which the Writ abated. 2.

The Plaintiff ought to ſhew that one land was in the poſſeſſion of Rocker and Crooke, for otherwiſe it is impoſſible that a Fine ſhould be made thereof, 12.H.7.8.a. & 6.H.7.6.a. If I am bound to infeoff another of all the Lands whereof my Father died ſeiſed in an Action againſt me, I ought to ſet forth the certainty of the Land whereof he died ſeiſed. And although the Executor does repreſent the perſon of the Teſtator, yet the Act of the Executor is not the Act of the Teſtator, not like to the Caſe of an Attorney, 32.Ed.3.Bar.264. If one be bound to enfeoff another, it is ſufficient if the Attorney be ready to make the Feoffment: and ſo in the 19.H.6. the ſame Law to confeſſe an Action: but when an Executor does an Act for the Teſtator it is otherwiſe, as if the Executor ſell Land, it muſt be ſo pleaded, for a dead perſon cannot ſell Land. 3.

And afterwards the Plaintiff diſcontinued his ſuit.

Hillar. 13. Jac. Norris Plaintiff, againſt Henry Baker and Elizabeth Baker Defendants.

IN an Action of Treſpaſſe for that the Defendants the 28. Octob. 13. Jac. by force and armes, &c. upon one Thomas Davis and Nicholas James Servants and Workmen of the Plaintiff, did make an aſſault, and them there labouring in the ſervice of the Plaintiff did wound, &c. whereby the Plaintiffs loſt their ſervice, to his damage of forty pounds &c.

The Defendants as to the force and according did plead not guilty, whereupon Iſſue was joyned: And as to the reſtone of the Treſpaſſe, they ſay, that at the time of the Treſpaſſe the ſaid Henry was and yet is poſſeſſed of an ancient Houſe with the appurtenances in Worceſter, for divers years to come, the which houſe doth joyn to a void peice of land in Worceſter againſt the South, and that at the time wherein, &c. and alſo time out of mind, there were ancient Windows or Lights in and upon the South-ſide of the aforeſaid houſe againſt the ſaid peice of land, through which the light did enter into the ſaid houſe, and the ſaid Henry did enjoy great and neceſſary Eaſements and Commodities by reaſon of the open Ayre and light ſhining and entring into the ſaid houſe, by reaſon of the ſaid Windows and Lights aforeſaid: and the ſaid Thomas Davis and Nicholas Jones, maliciouſly plotting and intending to deprive

the

the ſaid Henry of all the Caſement and commodity of the aforeſaid Windows and Lights, Et Meſſuagium illud horrida tenebritate obſcurare: the ſaid day and year did intend to build a houſe upon the ſaid peice of land, and did there then erect divers peices of Timber for the building of the ſaid houſe, which houſe if it had been built, the ſaid Henry ſhould have loſt the ſaid caſements and commodities, wherefore the ſaid Henry and the other Defendant who was his Servant by his commandment the ſaid time wherein, &c. being in the ſaid houſe, did hinder the ſaid Thomas Davis and Nicholas Jones from building the ſaid houſe, and the Defendants with a Staff did thruſt down the ſaid peices of Timber, wherewith the ſaid Thomas Davis and Nicholas Jones would have built the ſaid houſe, and did thruſt and put away the ſaid Thomas Davis and Nicholas Jones, leaſt they ſhould build the ſaid new houſe. Prout ei bene licuit, which is the ſame Aſſault and Battery of the ſaid Thomas Davis and Nicholas Jones, whereof the Plaintiffs complain.

Upon which Plea the Plaintiffs demurred in Law.

And I conceive that Judgment ought to be given for the Plaintiff.

I. Becauſe the Defendants have made no anſwer to the firſt matter of the Action, which is the loſing of the Service, for it is not ſhewne throughout the Bar that the ſaid Davis and Jones did make the building as Servants to the Plaintiff, or by his commandment: and 2. H. 6. 13. In a Treſpaſſe for cutting of Trees where the Defendant pleaded, that the place where, &c. was the Freehold of I. S. who let the ſame to the Defendant at Will, and adjudged no plea by the Court, unleſſe he had ſaid by which he entred and cut the Trees, and ſo juſtified the Action, 3. H. 6. 54. In a Treſpaſſe for beating of his Tenant, the Defendant ſaid he was his Servant, and the Iſſue was whether he was his Servant or not: 31. H. 6. 12. B. 3. H. 7. 3. 20. H. 7. 4. and 20. H. 7. 5. A Maſter ſhall not have an Action for beating of his Servant, unleſſe he ſaies, Per quod ſervitium amiſit.

II. The cauſe of Juſtification is, becauſe the Servants did endeavour to erect a Building which is not iſſuable.

III. There is no cauſe of Juſtification, for how can the Defendant know that the building will be to his hurt or nuſance to him, untill the building be erected, and if it be to his nuſance he may abate the ſame by Law.

IV. The Plea is double, for firſt they ſet forth that they had Lights, &c. and then they alledge that the new houſe was built, for the word, (if) is wanting, and 33. H. 6. 26. In an Action on the Caſe the Writ was good, Cum ipſe habeat quoddam Cheminum ratione tenuræ, &c. the Defendant levavit murum per quod querens Cheminum habere non poteſt, &c. It was holden by Priſot that the Writ was not good by reaſon of the Repugnancy.

Judgment. And this Caſe was argued again by Barcley, for the Defendant, and by me for the Plaintiff, Tr. 14. Jac. And all the Court held the Plea in Bar to be inſufficient, for which Judgment was given for the Plaintiff.

Rot. 256. Hillar. 13. Jacob. Edward Smith for the King and himſelf, againſt Stephen Bointon.

IN an Information becauſe, the Defendant between the twentieth of June, 12. Jac. and the fourth of July next after at Weſtminſter in the County of Middleſex, did buy, ingroſſe, and obtain into his hands by buying and contracting of divers perſons unknown, three hundred quarters

ters of Barley, of the value each quarter of twenty pounds, a hundred quarters of Beans of the value of twenty pounds every quarter, Ad revendendum contra formam ſtatuti, &c. whereupon an Action accrued to the King and the Informer to have of the Defendant foure hundred pounds, viz. the value of the Barley and Beans, whereof the Informer prayed a moyety, &c.

The Defendant as to the Ingroſment between the twenty ſecond of May, 13. Jac. and the ſaid fourth of July next after, pleaded not guilty.

And as to the Ingroſment between the ſaid twentieth day of July, 12. Jac. and the ſaid twenty ſecond of May next after, The Defendant ſaith, that before the exhibiting of the ſaid Information, ſc. the twenty ſecond of May, 13. Jac. one Robert Beadow did exhibite an Information in the Exchequer for the King and himſelf againſt the Defendant, becauſe the Defendant between the firſt of June laſt, and the day of the ſaid Information, did ingroſſe five hundred quarters of Wheat, of price every quarter thirty pounds, five hundred quarters of Barley, of price every quarter twenty pounds, five hundred quarters of Oates, of price every quarter twenty ſhillings, and five hundred quarters of Beans and Peaſe, of price every quarter twenty ſhillings, Ad revendendum contra formam ſtatuti, &c. And did aver that Stephen Bointon named in the firſt Information, and Stephen Bointon named in the laſt Information are one perſon and not divers, and that the ſaid three hundred quarters of Barley, and a hundred quarters of Beans ſpecified in the laſt Information, are parcell of the aforeſaid Barly and Beans in the firſt Information, Unde petit judicium, of the ſaid laſt Information, the ſaid firſt Information depending determinable.

Upon which Plea Mr. Attorney demurred in Law.

And I conceive that Judgment ought to be given for the King and the Informer, for two reaſons.

The offence in the firſt Information is alledged to be between the firſt of June, 12. Jac. and the two and twentieth of May, 13. Jac. ſo that for any thing appears to the contrary, this may be done between the firſt of June, 12. Jac. and twentieth of July next, which is not any part of the time contained in the laſt Information, and then, that is no anſwer to the ingroſſing between the twentieth of July, 12. Jac. and the two and twentieth of May next, unleſſe he had averred in fact that it was within the time contained in the laſt information. 1.

The twenty ſecond of May, 13. Jac. is not anſwered to at all, and it may be that the Ingroſment was on that day; for the plea of Not guilty goes only between the two and twentieth of May, 13. Jac. and the fourth of July next, and the laſt information is between the firſt of June, 12. Jac. and the twenty ſecond of May, ſo that the twenty ſecond of May is utterly excluded, and that is part of the time contained in the laſt information. 2.

The firſt Information is for ingroſſing of Beans and Peaſe, being a mixt Grain, and the laſt Information is for Beans only, and Beans by themſelves cannot be parcel of Beans and Peaſe, being a mixt Graine. 3.

And after Judgment was given for the King and the Informer, and that principally for the ſecond exception. Judgment.

Michalm. 14. Jacob. Froſett againſt Walſhe.

IN an Ejectment of one Meſſuage, ten acres of Land, ſix of Meadow, and thirty of Paſture in Manſell Lacy upon a Leaſe made by Hen Her-

ing the younger, the twenty fourth of October, 13. Jac. to have from the twenty third of October last past, unto the twenty second of October next, &c.

The Defendant pleaded not guilty.

And the Jury found, that the said Tenements were Copyhold, parcell of the Mannor of Mansell Lacy, devisable in Fee, and that there is a Custome within the said Mannor, that every customary Tenant of the said Mannor of any Inheritance may surrender the said Tenements out of Court into the hands of two customary Tenants of the aforesaid Mannor, to the use of any person or persons and their Heirs, and that the said surrender by the Custome of the said Mannor ought to be presented at the next Court to be holden within the said Mannor, otherwise the surrender to be void. And they found that one Thomas Herring was seised in Fee at the will of the Lord, according to the custome of the Mannor, of the said Tenements, and that he and Anne his Wife, the twenty second of Decemb. the 28. of Eliz. at Mansell aforesaid, did surrender the said Tenements out of Court, into the hands of William Garrows and Hugh Ireland then being two customary Tenants of the said Mannor, to the use of Rowland Whittington, George Whittington, and Robert Whittington, and their Heirs, and that the said Rowland, George, and Robert, by vertue of the said surrender, did enter into the said Tenements and held the same, and paid the Rents thereof that were due to the Lord, and that the said Thomas Herring before the Ejectment died, and that no Court was holden within the said Mannor during his life, nor ever since, and that the said Rowland Whittington afterwards and before the Ejectment died, and the said William Garner and Hugh Ireton also died before the Ejectment, and that the said Henry Herring is the Son and Heir of the said Thomas Herring, and that the said Henry the twenty fourth of October, the 13. Jac. did enter and made the Lease to the Plaintiff, who did enter and was possest, until the Defendant, as Servant of the said Rowland and Robert Whittington, the twenty fifth of October the same year, did enter and oust the Plaintiff.

And, if it seemed to the Court that the Defendant was guilty, the Jury found for the Plaintiff, and if otherwise, for the Defendant.

And I conceive that Judgment ought to be given for the Plaintiff.

1. The Custome is precisely found that the surrender which is made out of Court is good, so it be presented at the next Court, so that here is a perfect assurance made according to the custome of the Mannor, which the Copyholder that surrenders cannot avoid, unlesse something fall out afterward that may avoid the surrender, for as to the Cases that have been put by the other side, that every Custome shall be taken strictly, and therefore the custome of Kent that saves the Land of him that is hanged for Felony, does not extend to an Attainder by Outlawry, nor the custome that an Infant of the age of fifteen years may make a Feoffment, does not warrant a Lease and Release. I agree all these to be Law; but I cannot conceive how any of them can be applyed to the present question, for I do not endeavour to extend this custome in any point beyond the true expresse Letter of the custome, viz. That the surrender shall be good if it be presented at the next Court.

Object. 1. But there have been two things objected to impeach this surrender.

I. That Herring who made the surrender is dead.

And as to that I conceive that the surrender is good, notwithstanding; for every Copyholder of Inheritance hath as good power to dispose of his land according to the Custome as a Tenant in Fee-simple hath by the

Rules

Rules of the Common-law: for although he that comes in by surrender, ought to be admitted by the Lord, yet all the Estate passeth from the Copyholder who surrenders, and the Lord is but an instrument to make the admittance, and he gives not the Estate; and therefore it follows, that the Estate is given by the Copyholder himself. Cooks Rep. 4. Charls Pennifathers Case, That Copyholders derive not their Estates from the Estate of the Lord, and therefore if a Disseisor or Tenant at sufferance do make an admittance upon a surrender, or upon a descent, this shall binde the Disseisee: and if Tenant for years of a Manor, or a Tenant at will, does make a voluntary Grant according to the custom, this shall binde him in the Reversion: and the same Law of a Feoffee upon Condition. Dyer 342. And so if there be Lord of a Manor wherein are Copyholds for life, and the Lord marries, and grants Copies, the Wife shall not avoyd this. 9 Rep Swans Case, and 4 Rep. Taverners Case: The Lord is but an instrument to make admittance, and he that is admitted shall not be subject to the charge of the Lord. And 4 Rep. Buntings Case, who surrendered out of Court, and dyed before the surrender was presented; yet it was resolved and adjudged, that the surrender was good, and that it may be presented after his death: but if it be not presented according to the custom, then it becomes voyd. And so in Kite and Queintons Case: If he to whom the surrender was made dyes before the admittance, yet his Heirs shall be admitted. And Periams Case: The Feoffment is not good, unless it be presented in Court according to the custom: yet if the Feoffor or Feoffee dye, and after it is presented, this is good, as in case of a Deed delivered as an Escroul upon condition

The second is, that the two Tenants to whom the surrender was made, are dead also. 2. Object.

But this will not avoyd it: for nothing at all does pass from them, for they are but only witnesses of the surrender, and therefore it may as well be presented after their deaths, as in their life-time: as in 1 H. 7. 9. If a Justice takes a note of a fine, although he dyes before it be certified, yet may it be certified by his Executors, and the Fine shall be good: and it is also resolved in Buntings Case, that their death shall not hurt the surrender, but upon good proof it may be surrendered after their deaths: as in 27 H. 6. 7. If a Feme sole does make an Obligation, and delivers it as an Escroul to a stranger to be delivered upon condition, and she marries or dyes, and then the Condition is performed, and the Bond delivered, it is a good Bond: and so it is resolved in Brags Case, and Butlers Case also: and it is not like to a Feoffment with warranty of Attorney to make Livery, or the Grant of a Reversion, and the Feoffor dyes, or takes husband before Livery or Attornment; for there nothing passeth until the Livery or Attornment, according to Littleton: and the Feoffee, if he enter, is but Tenant at will, and it lies in the power of the Grantor to countermand it, but so cannot he that makes a surrender out of Court. Answer.

Note, Perimans Case was here objected, That if the Tenant would not present the Feoffment, the Feoffee should have his Action on the Case; and the same Law, if the Lord will not hold his Court within the time: but there is no such matter in the Book. But in our Case, no Action can be against the two Tenants, to whom the surrender was made, having done no wrong, for they can make no presentment before a Court be held: neither can any Action be brought against the Lord, for the not holding his Court, because he is not limited to a

certain time to hold his Court; neither does the cuſtom refer the preſentment to any time, but onely to the next Court: and admitting he may have an Action on the Caſe, yet is not that any reaſon that he ſhould loſe his cuſtomary Inheritance, and be contented onely with a perſonal Action, wherein he ſhall onely receive damages; and it may be alſo, that the party is inſufficient, or may dye, whereby the Action will become fruitleſs. And it ſhall be a very great inconvenience, if the not keeping of a Court by the Lord ſhall hinder the ſurrender, when no time is limited when the ſurrender ſhall be, but onely at the next Court: for then thoſe who argue againſt this ſurrender, ought to limit another time then the cuſtom doth limit to make this preſentment: and what time will he limit? peradventure he that made the ſurrender will ſay, that the next Court ought to be holden the next day, or within a month; but this lies not in his power: for when the Cuſtom, which is the very being and life of a Copyholder, hath limited the next Court, no man can ſhorten that time, and the length of time cannot be material, and no time is material until the time be paſt that is limited by the Cuſtom. And although it hath been ſaid, that Cuſtoms ſhall be taken ſtrictly, yet not ſo ſtrictly, but they ſhall have a reaſonable time of expoſition according to the reaſon of the Common-Law: as in the 9 Rep. Sir Richard Lerchfords Caſe, where the cuſtom was, that if the Heir of the Copyholder did not come to any of the three Courts upon proclamation, to claim his Copy, it ſhould be forfeit: And Thomas Copley did dye the 27 of Elizabeth, William his ſon being then beyond the Seas, and the three Courts were holden, and the proclamations made, and he came not into England until the firſt of King James. But in our caſe, we are within the Cuſtom: and although the ſurrender here is not perfect, until the preſentment made in Court; yet the Plaintiff, being Heir to him who made the ſurrender, is bound as his Anceſtor was; for he cannot countermand or avoyd the ſurrender, and therefore his entry was illegal. And therefore Judgment ought to be given againſt the Plaintiff.

And upon the Argument of this Caſe, Michaelm. 14 Jacob. Crook, Doderidge, and Haughton, did agree, that the Eſtate did remain in him who made the ſurrender, until he to whoſe uſe the ſurrender was made be admitted by the Lord: and this they agreed the Lord might do out of Court: and Haughton ſaid, that the acceptance of the Rent by the Lord, that was found by the Jury, does amount to an admittance: but the other on the contrary.

Judgment. Wherefore Judgment was given for the Plaintiff.

Rot. 832.

Trinit. 12 Jacob. John Gouge Plaintiff, Nicholas Hayward, and Jane his wife Defendants.

IN an Action of Treſpaſs, wherein the Plaintiff declared, that Stephen, Biſhop of Wincheſter, the 13 of March, 24 H. 8. did demiſe to Thomas Windham two houſes, one now in the tenure of the Plaintiff, and the other in the tenure of the Defendant, in the pariſh of St. Saviours in Southwark, Habendum from Michaelmas laſt paſt, for the term of 99 years. And that the 16 of March, the 24 H. 8. the Prior and Chapter of the Cathedral Church of St. Swithin in Wincheſter, in the life of the Biſhop, did confirm the ſaid Leaſe, that the 10 of May, 10 Eliz. Thomas Windley aſſigned over to Francis Weſtby

Weſtby, who aſſigned to William Fryth, who aſſigned to John Butler, who the laſt of September, the firſt of King James, by his Will did Deviſe to Ellinor his Wife, all his Lands and Tenements in the ſaid Pariſh, and all Rents ariſing out of the premiſes to come, from the day of the date of the ſaid Will, for 28 years (if ſhe ſhall ſo long live unmarryed) and after deviſed it to Thomas Butler his Nephew, to have to him and his Children, from the day of the death of the ſaid Ellinor during the whole term. And further deviſed, that in caſe his Wife Ellinor ſhould marry, then during the reſidue of the ſaid 28 years, not expired at the time of her marriage, ſhe ſhould have the Meſſuage then in his tenure, being his Manſion-houſe (which houſe now is in the tenure of the Plaintiff, and an Annuity of 20 l. out of all his other Lands, Tenements, and Houſes of the Deviſor in the ſaid Pariſh, with a clauſe of diſtreſs, and to detain the ſame until the ſaid Annuity were payd to the ſaid Ellinor: and if Ellinor did marry, he did deviſe all his ſaid Lands (except the ſaid Manſion-houſe) to the ſaid Thomas Butler and his Children, and made the ſaid Ellinor his Executrix, and dyed poſſeſſed. And the ſaid Ellinor entered, claiming the Deviſe, and the 16 of January 1606. marryed the Plaintiff: and the 30 of April 1606. the Plaintiff and his Wife did agree to have the ſaid Manſion-houſe, and the ſaid Annuity, and Thomas Butler by their aſſent did enter into the reſidue.

And the 12 Jan. 1606. Elianor dyed.

And at our Lady-day, 12 Jacob. 10 l. of the ſaid Annuity was behinde: wherefore the Plaintiff, the 26 of May 12 Jacob. did enter and take certain goods for the ſaid 10 l. and would have deteined them in the name of a Diſtreſs, and the Defendants reſcued them ad damnum 40 l.

The Defendants pleaded Not guilty.

The Jury found the Leaſe made by the Biſhop, and the confirmation with the ſeveral Aſſignments, and the Deviſe as in the Declaration is ſet forth (ſaving the Deviſe to the ſaid Thomas Butler, from the day of the death of the ſaid Ellinor) which clauſe was not found: and they found alſo, that John Butler, the 3 Novemb. 3 Jacob. dyed, and that Ellinor did enter, claiming by the Deviſe, and that ſhe married the Plaintiff: and alſo their agreement to have the Manſion-houſe and Rent as a Legacy, and the entry of Thomas Butler in the reſidue by the aſſent of the Executor, and the death of Ellinor, and that the 10 l. was behinde, and that the Plaintiff took the goods, and would have detained them as a Diſtreſs, and that the Defendants reſcued them. And if the Defendants were guilty, they found for the Plaintiff, if not, they found for the Defendant, &c.

And I conceive Judgment ought to be given for the Defendants.

For firſt, I conceive that the Wife of John Butler had not any Rent at all out of the houſe in which the Diſtreſs was taken. 1.

If ſhe had any Rent, yet it is determined by her death. 2.

And I conceive the Caſe to be thus:

Leſſee for years of two houſes, does deviſe them to his Wife for 28 years (which is all the term) if ſhe live ſo long unmarryed, and after her death to Thomas Butler: and if the woman marries, that ſhe ſhall have one Meſſuage for the reſidue of the term, and 20 l. Rent ex omnibus aliis terris ſuis, with a clauſe of Diſtreſs; and then Thomas Butler ſhall have the other Meſſuage. The Deviſor makes his Wife Executrix, and dyes; and the Wife enters, claiming by the Deviſe,

and

and then marries the Plaintiff, and then they agree to have the houſe that was deviſed to her after her marriage, with the Rent; and Thomas Butler by their aſſent does enter into the reſidue: the Wife dyes, and the Plaintiff diſtrains for Rent behinde after her death, and the Defendants reſcue the Diſtreſs, whereupon the Plaintiff brings his Action.

And as to the firſt, I conceive that the Wife can have no Rent by this Deviſe, and that for three Reaſons.

1. Becauſe the Wife did take the entire term as Executrix, and therefore ſhe cannot have a Rent out of the ſame term: and therefore I conceive it will not be denyed, that if Leſſee for years deviſeth a Rent to I. S. and makes him his Executor, and dyes, I. S. ſhall have no Rent, for in as much as he hath the term as Executor, he ſhall have no Rent as Legated, for it is extinct in the term; and although he hath one in his own right, and the other as Executor, yet cannot he have both together. 4 Ed. 6. B. Surrend. 52. If one hath a term as Executor, and purchaſe the Reverſion, the Leaſe is extinct. And although the term in our caſe is deviſed to a ſtranger, yet by the Law it does firſt veſt in the Executor, and the Deviſee cannot have it without the delivery or conſent of the Executor. And if a Deviſee does enter into a term, or takes goods without the delivery of the Executor, the Executor may have an Action of Treſpaſs againſt him. 20 Ed. 49. 2 H. 6. 16. 11 H. 4. 84. 37 H. 6. 30. although in the 27 of Henry the 6. 8. a. diverſity is taken between a thing certain and uncertain; for it is there ſaid, that if the thing deviſed be certain, and a ſtranger takes it, the Executor ſhall have an Action of Treſpaſs: but in old Nat. Bre. 87. there is no diverſity.

So that it is clear, that the term firſt veſteth in the Executor, and ſo the Rent which the Executor had is extinguiſhed by unity of poſſeſſion.

Object. And whereas it hath been objected, That although the term does firſt veſt in the Executor, yet when he aſſents to the Deviſe, he is then immediately in by the Deviſor, and therefore the Rent is not extinct.

Anſwer. I anſwer, That there the agreement does diveſt all the Eſtate that the Deviſor had gained by his entry, but in our caſe the woman hath as high and right an Eſtate in the Land, as ſhe hath in the Rent: and although there be a poſſibility of ſevering the Land from the Rent, yet that cannot revive the Rent being extinct; as if one hath Land of the part of his Father, and hath a Rent out of the ſaid Land of the part of his Mother, the Rent is extinct, and cannot be divided, although he dye without iſſue. And that the Wife hath as high Eſtate in the Land, as ſhe hath in the Rent, appears in Cook. 6 Rep. Sanders Caſe: where if an Executor commits waſte before he aſſent to the Legacy, an Action of waſte lies againſt him, which proves, that the Executor hath the term. And although the Deviſee, after his aſſent, is in by relation by the Deviſor, yet this will not ayd the Rent, no more then if a Son having Rent out of his Fathers Land, and the Father dyes, and the Son endows his Wife, this ſhall not revive the Rent which was extinct before, yet is the Wife in, as of the Eſtate of her Husband, and the Eſtate and poſſeſſion of the Son is utterly defeated.

But admit that the Rent be not extinct, yet here is no agreement to have the Rent: for here are two Deviſes; 1. Of the Land to the Wife, if ſhe continue unmarryed, the remainder to Thomas Butler:

and

and the other of twenty pounds Rent to commence after her marriage, wherefore the assent of the Executrix to the Devise of the Land, is no execution of the Devise of the Rent. Comment. 5.21.B. Welden and Elkingtons Case: If a Termor deviseth a Rent or a Common to one, and the Term to another, and dies, and the Executor payes the Rent, or suffers the Devisee of the Common to put in his Cattell, this is no assent as to the Term, for the Term is one thing, and the profit out of it is another thing: but there in the principall Case the assent of the Executor of the Devise to occupy the Land, was a sufficient assent to the Remainder of the Term, because the occupation of the Land and the Land it self is all one: and Comment. 541. the same agreed, and that the first assent doth go to all. And it is no assent to the Term, neither can it be taken by Implication to be any assent to the Devise of the Rent; for every Act that does enure to another Act by Implication, ought to be such as of necessity ought to enure to the other Act which cannot be taken to be otherwise, and therefore 2 R.2. Attornment the 8th. A Woman grants a Reversion to which a Rent was incident, and afterwards marries the Grantee, to whom the Tenant payes the Rent, this is no Attornment, for it is indifferent whether he payes the Rent to him as Grantee, or in right of his Wife, Dyer 302. Vivors Case, que recover. Rents of severall Tenants, as Bayly, and then they be granted to him, and after the Grant they be paid to him, this is no Attornment, for they may be paid to him as he is Bayly, as well as he is Grantee. But if the Lessee do surrender to him in the Reversion, then it is a good Attornment, for a Surrender cannot be to any but to him that hath the Reversion. And so in our Case it is cleer, that the assent to the Legacy of the Land it self, is not any expresse assent to the Rent, nor any implyed assent, for there may be an assent to the one and not to the other, and where the Wife had assented to the Devise of the Term, she hath utterly dismist her self of the Term as Executor, notwithstanding the assent to the Rent, but having once assented to the Devise of the Term, she hath no more to do with it, and therefore in such Case the Legatee of the Rent ought to sue in the Court Christian for his remedy against the Executor in the same manner, as if a Term were devised to one, and the Executor will not assent to it, but sells the Term to another. And in this case if the Testator were indebted after this assent to the Devisee of the Term, the Term cannot be put in execution for this Debt, but the assent of the Wife is in her a Devastavit. 21 Ed.4.21. 37 H.6.30 2 H 6.16.

Also here is no Rent devised out of this house, for the Devise is, Ex omnibus aliis terris suis, which word (all) excludes all the Lands whereof any mention was made before.

And Coke Rep 1. Mildmayes Case: There Sir H.S. did covenant for a Joynture for his life, and for the advancement of his Issue Male if he had any, and for advancement of his three Daughters, and for continuance of his Land in his blood, to be seised to the use of himself for life, and then of part to the use of his Wife for her life, with other remainders to his Issues Males and Females; Proviso, that it should be lawfull for him to limit any part to any person for life or years, for payment of Debts or Legacies, preferment of his Servants, or other reasonable considerations. And then he did limit the part of one of his Daughters to another for the term of a thousand years, and this was adjudged a void limitation, and one principall reason was, because that the word (other) cannot comprehend any consideration mentioned in the Indenture before the Proviso, and the advancement of his Daughter was mentioned before.

But

2 Object. But it may be obiected that other Lands shall be understood such as shall be demised after her marriage, and so will not relate to the house whereof there was mention made before.

Answer. That this Obligation is against the reciten resolution, for it may as well be said in this Case that (other considerations) shall be other then what are mentioned in the said Proviso, but it was resolved that (other) shall exclude all considerations mentioned before the said Indenture, and so he excludes in this case all mention before in this Writ.

And this Case was argued at the Bench, Pasch. 14. Jac. And all the Justices did agree that all the exceptions taken by the Counsell of the Defendant, as well to the matter as to the pleading to be of no force, saving the principall point, sc. If the Rent shall be determined by the death of the Wife or not, and herein the Court was divided, viz. Haughton and Crook held that it was determined, but Coke and Doderidge on the contrary. Et sic pendet, &c.

Hillar. 12. Iac. Iohn Harry and Lewis Howell, against Grace Harry.

IN a Writ of Errour brought to reverse a Judgment given in a Writ of Dower brought by the said *Grace*, of the endowment of *Richard Harry* her Husband: And the Error assigned was, because the demand amongst other things was, *De tertia parte de uno Horreo & uno pomario*, and the Tenants pleaded, *Ne unques accouple in legall matrimony*, which was certified against them, whereupon Judgment was given against them; whereupon the Demandant did surmise that her husband died seised, and so prayed her Dower with damages, *Et petit breve tam de habere facias seisinam quam de inquirendo de damnis*, and the Writ of Error was purchased before the return of the said Writ, or any Judgment given thereupon.

And I conceive that it is Error, for the Demand ought to be as certain and formall as a Writ, for the Writ of Dower being generall, *De libero tenemento*, the Demand ought to make it certain, and therefore it is of the same nature as the Writ is, 8. *Ass.* 29. 13. *Ass.* 2. 13. *Ed.* 3. *br.* 265. A Chappell or an Hospitall shall not be named but by the name of a Messuage; and 8 *H.* 6. 3. *Precipe quod reddat* does not lye of a Cottage, and *Coke* 11. Rep. *Serbes* Case, in an *Ejectione firmæ* of a Close called *Dumets* Close, containing three acres, adjudged insufficient, for the name and quantity will not serve without the quality, and certainty ought to be comprised in the Court, because the possession is to be recovered.

And it was adjudged that the Error would not lye.

Loyde against Bethell.

HUmphrey Loyde brought a Writ of Error in the Kings Bench against Bethell and others to reverse a Recovery had at Cardiff in the County of Flynt, by Nicholas, John, ap Robert Loyde, to whom the Defendants are Heires, against John ap De ap Robert Loyde, for the now Plaintiff of Land in the County of Flynt, which Assise did begin in the time of Queen Mary, and did continue untill the Reign of Queen Elizabeth the third year; and Judgment was given therein, whereupon the Tenant to the Assise brought a Writ of Error the 5. Eliz. in Easter Term, which did abate by reason of his death, and after in the time of King James the new Plaintiff brought a Writ of Error in Re-

cordo

cordo quod coram nobis reſidet, which did alſo abate by reaſon of variety between the Record and the ſecond Writ of Error, whereupon Mich. 13. Jac. the ſaid Plaintiff did purchaſe this new Writ of Error.

And the Defendants did plead in abatement of the ſaid Writ of Error, that the now Plaintiff before the purchaſing of the ſaid laſt Writ of Error, and ſince the purchaſing of the ſecond Writ of Error, viz. the 19th. of September, the 10. Jacob. did enter into the ſaid Land, and the ſame day and year at the place aforeſaid did deviſe the ſaid Tenements to one Thomas Alport. Habendum from the Feaſt of S. John Baptiſt then laſt paſt for four years next enſuing, by vertue of which Demiſe the ſaid Thomas Alport into the ſaid Tenements did enter, and was and yet is poſſeſſed.

Upon which Plea the Plaintiff demurred, and the Defendants joyned.

And I conceive that the Plea is inſufficient.

Yet I do agree that if he who hath cauſe to have a Writ of Error to reverſe a Judgment of Land, does make a good Leaſe for years, he hath ſuſpended his Writ of Error for the Term; as he does quite extinguiſh it by his Feoffment.

But here it appears that there is no Leaſe made, for it is pleaded only that the Plaintiff did enter into the Land, and it appears by the recovery that his entry was taken away by the Judgment in the Aſſiſe, whereby he gains nothing by his Entry but the Freehold and poſſeſſion, does remain alwaies to the Defendants being Heirs to the Recovery, as appears by Litt. Warrant. 58. If one be ſeiſed of Land, and another who hath no right doth enter into the Land and continues poſſeſſion, yet doth he gain nothing thereby, but the poſſeſſion doth alwaies continue in him that hath right, and ſo in the 3. Ed. 4. & 2. Woolocks Caſe, and in the Comment. 233. Barkleys Caſe: Execution is taken to be no plea in Bar to an Ejectment, becauſe it was ſhewed that the Lord Barkley did enter as in his Remainder, and was ſeiſed in Fee untill the Leſſor of the plaintiff did eject him, and did demiſe to the Plaintiff, which is not good, becauſe it is not alledged that he diſſeiſed the Lord Barkley, for otherwiſe he had no Eſtate to make the Leaſe, and the Entry doth not imply any diſſeiſin, or doth gain any poſſeſſion, and 11 Edw. 4. 9. B. 12 H. 6. 43. B.

And the Court did agree that the plea was inſufficient.

But then it was moved that the Writ of Error was nought, for the Writ was, that Quidem Recordum & proceſſus Dom. Regina Elizabeth. nuper Regina Angliæ (cauſa erroris interven.) venire fec. and it appears by the Record, that although the Recovery was reviewed by Writ of Error the 5. Eliz. at the Suit of the Father of the Plaintiff, yet the Plaintiff did purchaſe a new Writ of Error, Mich. 9 Jacob. and had a Scire facias againſt the Heirs of the Recoveror who appeared Mich. 10. Jacob. and alſo the Writs of Habeas Corpus, tales & Diſtringas, wherefore the Writ is naught, for all the Recovery was not in the time of the Queen, but part in her time, and part in the Kings time.

But I conceive that it is good enough, for firſt the Recovery and Proceſſe is ſatisfied by tranſmitting the body of the Recovery, as it is proved by the uſuall form of all Writs of Error, which is to certifie the Record and Proceſſe, and yet they do certifie only the Declaration and the Pleas omitting the Writs.

Alſo the Record ſhall be intended the principall Record, and not the Writ and Proces, Coke Rep. 11. Metcalfes Caſe, the words of the Writ

of Error, Si judicium inde redditum fit, this shall be taken to be the principall Judgment, 33 Ed. 3. 2. An a Scire facias brought by John Duke of Lancaster, and Blanch his Wife, to execute a Fine levied to them in the time of Ed. 2. and the Writ did recite the Fine to be levied, Tenendum de nobis, &c. but it was adjudged good by Judgment of Parliament, and 2 R. 3. 4. Bough brought an Action of Debt against Collins, who pleaded a forein Attachment in L. by custome, and did misrake the Custome, and it was traversed that there was no such Custom, and the Major certified it so, and all this was in the time of King Edw. the first, and it was adjourned over to another Term, before which time the King died and returned in the time of King Richard the third, and Judgment given, whereupon Collins did bring a Writ of Error, which was, Rex Dei gratia, &c. quia in Recordo & processu & in redditione Judicii loquela quæ fuit coram nobis per breve nuper inter B. &c. error, &c. And the question was, if it was good. And some said that there was no Warrant for such a Writ, and some said, that the Writ ought to have been speciall, reciting how, &c. But the Makers of the Office said, that in a Writ of Error before the Justices of the Bench, there is but a generall form in the Writ.

And after it was adjudged that the Writ of Error was good.

John Vandlore Plaintiff, Cornelius Dribble Defendant, Trinit. 14 Jacob. Rot. 1062.

IN an Action of Debt on a Bond of two hundred pounds made the eleventh of Febr. the 12th. of King James, upon condition that the Defendant shall perform the agreement of William Holliday, Thomas Monlson, Robert de la Bar, and Humphrey Burlemacke, Arbitrators elected, &c. to arbitrate of and for all Actions, Suits, Accounts, and Demands, had, moving, or depending in variance between the parties before the date of the said Obligation, so that the agreement of the premisses be made and put into writing before the twentieth of March next.

The Defendant pleaded that there was no such Arbitrement.

The Plaintiff replyed that the eighteenth of March, 12 Jacob. they did make an Arbitrement, &c. of and concerning the Premisses, that the Defendant should pay the Plaintiff fifty pounds, viz. twenty pounds at April next ensuing five pounds at And the twentieth of July next twenty five pounds in full satisfaction and discharge of all such monies as the Plaintiff did claim or demand of the Defendant, by reason of the administration of the Goods, &c. of John Stadsell, or by any other means whatsoever. And that each of the parties upon payment of the said fifty pounds, shall make generall Acquittances one to the other of all Actions, Debts, and Demands, unto the day of the making of the said Acquittances: And alledged breach to be made in the payment of the said twenty five pounds the twentieth of April.

And whereupon the Defendant demurred in Law.

And I conceive that the Action will not lie: for the Arbitrement is void, because the Arbitrators have exceeded their authority: First, because they have no power to discharge any action or duty accrued to any of the parties as Administrators: Secondly, because that by the Release, the Obligation it self to stand to the Arbitrement is discharged. Cook, 10 Rep. 131. where Moor brought an Action against

Bedell

Bedell upon a promise to stand to the Arbitrement of A. and B. concerning all matters then in difference between them, and that was the last day of Novemb. 24 Elizab. And the 10 of Decemb. the 24 of Eliz. they did agree that Moor should pay to Bedell certain monies, and that Bedell should release all demands until the 15 of June 24 Eliz. and the Defendant, in consideration of this submission, did assume, that he would not sue any Execution upon a Judgment. And the Plaintiff there assigned two breaches; one, that he did not Release; the other, that he sued Execution. And this was found for the Plaintiff upon a non assumpsit, and entire damages given; and then after it was reversed by Error, because that the agreement as to the Release was void, and therefore the damages being entire, the Judgment was erroneous.

And Michaelm. 11 Jacob. Rot. 155. Staires against Wilde, wherein an Action of Debt upon an Obligation to perform an award of and concerning all matters, &c. And they make an Award, that one should pay to the other 3 l. and that each should release all Actions and Demands, and the breach was assigned in not paying the 3 l. adjudged to be a void Arbitrement in all, because it was to release all Actions at the time of the Release, which is not within the submission. And Pasch. 42 Eliz. Rot. 211. Knap against Maw, where the condition was to perform an Award of certain things, &c. who did award that one should pay 20 l. to the other, and that each should release all Actions and Demands; and the breach was assigned in non-payment of the money; and it was adjudged that the Award was void.

And at last all the Court agreed, that the Award was good, as to all that was submitted to, and void for the others, and that the breach being assigned in a matter submitted to, does give a sufficient cause of Action to the Plaintiff. Wherefore it was adjudged that the Plaintiff should recover, &c.

Hillar. 13 Jacob. Smith against Whitbrook.

IN an Action on the Case for words, viz. for saying to the Plaintiff the 4 Septemb. 12 Jacob. Thou (meaning the Plaintiff) art a Traytor, and an Arch-traytor, and I (meaning the Defendant) will hang thee, or be hang'd for thee: and after the 15 Septemb. 12 Jac. the Defendant did procure the Plaintiff to be brought before Sir Robert Cotton, Knight, and Robert Castle, Esq; two Justices of Peace of the said County for Oyer and Terminer, &c. and did complain to the said Justices, that the Plaintiff had said and published divers Traytorous words of the King, by reason whereof the Plaintiff was committed to the Goal of the said County by the said Justices, and there was imprisoned, and did so remain until the next Sessions of Peace of the said County, holden the 4 of Octob. 12 Jacob. before Robert Bell, Knight, Robert Payn, Knight, and other Justices, &c. and the Plaintiff was compelled to finde Sureties for his appearance against the next Sessions, to answer to such things as should be objected against him on the behalf of the King, and in the mean time to be of good behaviour, &c. At which next Sessions, holden the 10 Janu. 12 Jac. before the said Justices, and other Justices, the Plaintiff did appear; upon which, the Defendant the same day and year, in the publique Sessions, did say of the Plaintiff, I (meaning the Defendant) do accuse

Robert Smith, meaninin the Plaintiff, absolutely: whereupon the Plaintiff was committed to the Gaol by the said Justices, and there remained in prison for the space of a month; whereas the Plaintiff did never speak any Traytorous words against the King, nor had committed any Treason against the King; and this he lays to his damage of 1000 l.

The Defendant pleaded, that before the time wherein the said words are supposed to be spoken, viz. the third of Septemb. the 13 Jacob. the Plaintiff having speech of the King, did speak of him these Traytorous words; The King (meaning our Lord the King) is a scurvy King: and so justified the several words, and also the procurement of the Plaintiff to be brought before the said Justices.

The Plaintiff by Protestation saith, that he did not speak the said words of the King, and for plea did demur in Law, and the Defendant joyned.

Judicium. And after Judgment was given for the Plaintiff, without reading the Record, or having any argument, because that the justification was insufficient; and the Record was not read, because it imported Scandal to the King.

Cooper against Smith.

IN an Action on the Case for words, scil. Thou and Waterman did kill thy Masters Cook (meaning one Parnton, late Servant of Francis Dingley, Esq.) and thou wast never tryed for it, and I will bring thee to thy Tryal for it. The Defendant pleaded Not guilty, and it was found for the Plaintiff; and it was moved in Arrest of Judgment, that it was not averred that the Plaintiff had a Master, and that Francis Dingley was his Master; but resolved that it need not be averred: for if he had no Master, yet it is a Scandal: as if one should say, Thou hast stoln the Horse of J. S. there is no need to aver that J. S. had a Horse; and if averment be necessary, it is averred here, when he said, Thy Masters Cook: and there it is averred, that the Cook was servant to Francis Dingley: and it follows also, that Francis Dingley was Master to the Plaintiff. Wherefore Judgment was given for the Plaintiff.

Judgment.

Trinit. 14 Jacob. Weal against Wells.

IN an Action on the Case, for that the Defendant the 22 of Novemb. the 13 of King James, crimen Feloniæ querenti false & malitiose imposuit: and did cause him to be arrested and taken for the Felonious taking and stealing of five Heifers of the Defendant, and caused him to be brought before Sir Thomas Benner, one of the Justices of Peace, &c. and out of malice also, at the Sessions of Peace at the Guildhall, London, before the Major and other the Justices of Peace, &c. did cause him to be indicted maliciously and falsly for the Felony of stealing of five Steers the 23 Octob. 13 Jacob. and did cause him to be detained in the Gaol of Newgate, until he was legally acquitted at the Gaol delivery the first of December the 13 Jacob. to his damage, &c. 100 l. and did aver the matter in the indictment to be false.

The Defendant said, that the 18 Novemb. 13 Jacob. he was possessed of five Steers, and that certain Malefactors unknown to him did

steal

Weal them from him at Broughton in the County of Bucks: and that the 22 of Novemb. 13 Jacob. the Defendant purſued them to London, and there did ſearch for the Steers, and found them in the poſſeſſion of the Plaintiff, and did require the Plaintiff to ſhew them unto him, and how they came into his poſſeſſion: and becauſe that the Plaintiff did deny to deliver them unto him, and did refuſe to permit him to ſee them, and to ſhew how he came by them, and that the Plaintiff gave him ſuch uncertain anſwers, that the Defendant did ſuſpect the Plaintiff had committed the Felony: and the Defendant, for better examination of the premiſſes, and reſtitution of the ſaid Cattel, did inform the ſaid Sir Thomas Bennet of the premiſſes, and did procure a Warrant from him to bring the Plaintiff before him to be examined concerning the ſaid Cattel: whereupon the Plaintiff was brought before him, and examined; and becauſe he could not make it appear how he came by them, and for that he gave very uncertain anſwers, and for that the ſaid Sir Thomas did ſuſpect him, he did therefore binde him in a Recognizance of 50 l. to appear at the next Goal-delivery; and did binde the Defendant in a Recognizance of 20 l. to proſecute, whereupon the 29 Novemb. 13 Jacob. the Defendant did exhibit a Bill of Indictment, and did give evidence to the Jury that the Cattel were taken from him, and that he found them in the Plaintiffs poſſeſſion, and that he denyed the Defendant the view of them, or to ſhew how they came to his hands: whereupon the Jury found the Bill, and thereupon the Plaintiff did appear at the next Goal-delivery the firſt Octob. 13 Jacob. and was there impriſoned until he was legally acquited; which is the ſame impriſonment for Felony, and procurement to be indicted, and detainment in priſon, whereof the Plaintiff complains.

The Plaintiff confeſſes the Felony, but ſays that the 23 Octob. 13 Jacob. Thomas Burley was poſſeſſed of the ſaid five Steers at Barnet in the County of Hertford, and did then and there ſell the ſaid Cattel in open Market to the Plaintiff for 17 l. being a Butcher, and that the ſaid ſale was entered in the Toll-book, and the Toll payd: wherefore the Plaintiff was poſſeſt of them, and did bring them to his houſe in London the 24 Octob. 13 Jacob. and that the 21 Novemb. 13 Jac. he killed four of the ſaid Cattel: and then the ſaid 22 of November the Defendant came to his houſe to ſearch for the ſaid Cattel, and the Plaintiff did acknowledg to him that he had the ſaid Cattel, and that he had killed four of them, and that he had bought them as aforeſaid, and did then alſo ſhew unto him the Steer that was then living, and that the Defendant had ſufficient notice that the Plaintiff had bought the Cattel in the Market; and that although the Defendant did know that the Plaintiff had bought them, and was not guilty of the Felony, yet the Defendant out of malice, and againſt his knowledg, did charge the Plaintiff with Felony, &c. as he hath declared, abſque hoc, that the Plaintiff did refuſe to permit the Defendant habere viſum of the ſaid five Steers, or to ſhew how he came by them. Replication.

Whereupon the Defendant demurred in Law, and ſhewed that the matter of Inducement to the Travers was inſufficient, and that the Travers was inſufficient, and the matter not traverſable. Demur.

And I conceive that the Plaintiff ought to have Judgment.

For in the 7 Ed. 4. 20. In a falſe Impriſonment: The Defendant ſaid, that before the impriſonment one B was killed by certain perſons, in whoſe company the Plaintiff was; and the report of the

County

County was, that the Plaintiff was party to the Felony; whereupon he arreſted the Plaintiff for ſuſpicion, and did commit him to the Sheriff. And Bryan did Travers the Indictment without that, that the Plaintiff was in their company, and without that, that the report was ſo, &c. And Nidkam ſaid there, that iſſue could not be taken upon the report, but upon the matter in fact. For if men ſay in the Country, that I am a Thief, that is no cauſe to arreſt me, but matter in fact ought to be ſhewed which is Traverſable: whereupon iſſue was taken upon the firſt matter onely; and in the ninth of Ed. 4. it is holden that a man ought to ſhew ſome matter in fact to prove that the Plaintiff is ſuſpected. And 12 Ed. 4. 46. in a falſe Impriſonment, The Defendant who juſtifies upon a falſe impriſonment for Felony, ought to ſhew ſome matter in fact to induce his ſuſpicion, or that his goods were in his poſſeſſion, of which the Country may take notice. And in the 17 Ed. 4. 5. in a falſe impriſonment, the Defendant juſtified, becauſe that A. and B. did rob another, and did go to the houſe of the Plaintiff; whereupon the Conſtable did ſuſpect him, and did require the Defendant to aſſiſt him in arreſting him, &c. and holden there, that they ought to ſurmiſe ſome cauſe of ſuſpicion, or otherwiſe the plea was not good. 7 H. 35. Suſpicion cannot be tryed, becauſe it is but the imagination of a man, which lies in his own conceit. 5 H. 7. 4. In a falſe Impriſonment, the Defendant juſtified, becauſe that A. was poyſoned, and the common voyce and fame was that it was done by the Plaintiff, whereupon he was taken; and there it was argued, if this were ſufficient cauſe; ſome ſaid that he ought to ſhew ſome ſpecial cauſe, but it was agreed in concluſion that it was: but all agree, that ſuſpicion only is not enough, without alledging cauſe of ſuſpicion: and ſays, 2 H. 7. 16. and 7 Elizab. Dyer 236. In an action on the Caſe for calling one Thief, the Defendant juſtified for common voyce and fame, and adjudged inſufficient; but this with ſuſpicion had been ſufficient cauſe to arreſt one, and carry him to the Goal. And Michaelm. 38 and 39 Elizab. In the Common-Pleas, in an Action on the Caſe by Dampart againſt Symſon, for giving a falſe teſtimony, adjudged that the intent of the ſwearers cannot be put in iſſue or tryed. 2 H. 4. 12. B. 46 Ed. 3. 4.

2 H. 7. 3. In a Treſpaſs, the Defendant juſtified that he was robbed in the County of B. and did ſuſpect the Plaintiff in the County of Stafford: The Plaintiff pleaded, De ſon tort demeſne, &c. and it was there agreed, that all the caſe was in iſſue. And Tow ſaid, that it ſhould be tryed by both Counties, if they could joyn, but he doubted if they could joyn: but in the 16 of H. 7. 3. B. this caſe is reported to be adjudged, that if the Counties could not joyn, it was no plea, becauſe it ought to be tryed by both: And ſo de ſon tort demeſne ſhall be full of multiplicity, and therefore it is no plea, as in Crogates Caſe.

Alſo the War is not good, becauſe the Defendant ſays, he was poſſeſſed of five Steers, and doth not ſay, of the aforeſaid. 9 H. 6. 16. In a Quare Impedit brought by the King of a Chantery in the Chappel of St. Thomas in D. and made title to it, and the Defendant pleaded that there was a Chantery in the ſaid Chappel, and made title to it, and traverſed the title of the King, and adjudged to be no plea, becauſe he did not anſwer to the Chantry whereof the King had declared. And Paſch. 14 Elizab. Downing againſt Hayward: In a falſe impriſonment in Suffolk, the Defendant did juſtifie as ſervant to A. to whom

a Commiſſion of Rebellion of Chantery was directed, and the Plaintiff pleaded De ſon tort Demeſne, and found for the Plaintiff, and reverſed again by Error in the Star Chamber, becauſe that when the matter of juſtification, is upon matter of Record and matter in fact, or of matters done in two Counties that cannot joyn, the Iſſue ought to be upon one only.

And Paſch. 15 Jac. Judgment was given againſt the Plaintiff by the opinion of Mountague, Crook, and Doderidge, becauſe that all that was done after Sir Thomas Buriets Warrant was illegall, but they agreed that the Plaintiff might have an Action for the charging of Felony, and for all that was done before the ſaid Warrant. But Haughton diſagreed, who conceived that Judgment ſhould be given for the Plaintiff, becauſe the Plea of the Defendant was no juſtification for what was done before the warrant: but at laſt Judgment was given for the Defendant. Judgment.

Mills againſt Marſhall.

In a Writ of Error to reverſe a Judgment given for the now Defendant againſt the Plaintiff in the Common Pleas, upon an Action of Debt on a Bond of twenty pounds, Hil. 11 Jac. Rot. 1109. And the Bond was made the twentieth of Jan. in the 8rth year of King James, and it was on Condition to ſtand to the Award of George Cockrell, Edward Sureton, and William Waſſe, to arbitrate of and concerning all matters then depending between them, ſo that the ſaid Award be made and delivered to the parties, under the hands and Seals of the ſaid Arbitrators before the twenty ninth of January next. The Defendant pleaded that the Arbitrators the twenty fourth of January, in the ſixth year of King James, did make their Award of the Premiſſes by Indenture under their hands and Seals. 1. That all Controverſies and Suits between them unto the date of the written Arbitrement ſhould ceaſe, and that the Plaintiff ſhould have liberty to drive his Cattell to the River Eske, &c. and that the Plaintiff and Defendant ſhould work and maintain at all times from thence forward, a ſufficient Hedge by the top of the Scar, Sicut terræ prædicti Querentis & Defendentis extendunt (Anglice) as their own Ground goes, for ſecurity of the Cattell and Sheep, which ſaid Hill doth extend to the Land of Henry Facherly, unto the Pale which then was between the Land of the Defendant, and if any Trees or Woods growing in or neer the Woods of either party, ſhall fall in controverſie at any time, that it ſhall be arbitrated by the ſaid Arbitrators, three or two of them, which Arbitrement was delivered to the parties the ſame day, and the Defendant pleaded that he had performed &c. The Plaintiff replyed, that the Defendant did not make a ſufficient Hedge upon the top of the Scarr, Prout terra ſua extendit, the Defendant ſaid that before the Writ purchaſed, viz. the fourth of April, 12 Jacob. at Eſkdayle in the County aforeſaid, he did make a ſufficient Hedge upon the top of the Hill aforeſaid, prout terra ſua extendit, and ſo they were at Iſſue, and found for the Plaintiff, and Judgment given, and the Defendant brought this Writ of Error.

And I conceive Judgment ought to be affirmed.

Coke 5 Rep. Slingsbies Caſe. If one let white Acre to I.S. and B. Acre to I.D. and covenant with them, Et quemlibet eorum, that he is Owner, each of them may have an Action, and Coke 5. Rep. Hargots Caſe, Submiſſion to an Award, ſo as it be delivered to either of the parties, ought

ought to be delivered to each of them, 39 H. 6. 7.

And all the Court did agree that each of them ought to inclose against his own Land only, and so the breach was well assigned, wherefore the Judgment was well assigned: wherefore Judgment was affirmed.

Hilar. 13 Jac. Crawley against Marrow.

IN an Ejectment upon a Lease by Robert Faldoe, dated the one and thirtieth day of August, the thirteenth year of King James, of two Houses, two Orchards, forty acres of Land, ten of Meadow, and fifty of Pasture, in Bridgenorth, Habendum from the tenth day of the said month for three years, whereupon the Plaintiff was possessed untill the Defendant the eighth of October in the same year did enter and eject him, ad damnum, &c.

Upon not guilty pleaded.

The Jury found the Defendant not guilty, for all except one House and five acres of Land, and found further, that before the said time, the twentieth day of Decemb. 11 Eliz. Rowland Hayward Knight, was seised in Fee of the said one house and five acres of Land, and ten of Meadow, and being so seised thereof, did enfeoff John Day and Robert Marshall in Fee, to the use of John Whitbrooke and Margaret his Wife in Tayle, the remainder to the right Heirs of John Whitbrooke, and that the last of January, 12 Eliz. John Whitbrooke did enter into a Recognizance of a thousand pounds in the Chancery to Richard Faldoe, which money was not paid to Richard in his life time.

That John Whitbrooke and Margaret had issue John Whitbrooke Knight, and after and before the fourteenth of January, 8. Jacob. died, and before the said day Richard Faldoe made his Will, and did make Amphillis his Wife, his Executor and died, and Amphillis did make Robert Faldoe Esquire, and Thomas Shepheard Knight, her Executors and died, who undertook the Executorship, 14. Jan. 8. Jac. Robert Shepeard and Faldoe had a Scire facias to the Sheriff of Middlesex, to have execution of the Recognizance, whereupon John Whitbrook was returned dead, whereupon they had a Scire facias against the Heir and the Tertenant, whereupon John Whitbrook was returned Heir and Tertenant, who pleaded that he had no Land that was the Conusors at the time of the Recognizance, or ever since by hereditary descent from the Conuzor in Fee, and said that he ought not to be charged as Tertenant, because he hath no Freehold that was the Conusors.

The Plaintiff replyed, that the said John Whitbrook had divers lands by descent from the said Conuzor, viz. A house called the Hospitall, thirty seven Tenements or Messuages, five Cottages, one Loft, one Dove-house, thirty nine Gardens, six Barns, fifty four acres of Land, thirty nine of Meadow, and thirty six of Pasture in Bridgnorth, and that the said John Whitbrook was Tenant of the Premisses as of his Freehold, whereupon Issue was joyned, and found for the Plaintiffs, and adjudged that they should have execution against Sir John Whitbrook, whereupon the Sheriff was commanded to deliver the said lands to the Plaintiffs in execution, and the sixteenth of June, 12 Jacob. the said Tenements were found to the value of eighty shillings, and were delivered to the said Executors in execution.

The twenty seventh of March, 11 Jacob. hanging the Writ of Scire facias, the said Sir John Whitbrook did demise to the Defendant one Messuage

Meſſuage and ten acres of Meadow, parcell of the premiſſes. Habendum from the ſaid twenty ſeventh day for the term of three years, by force whereof he entred and was poſſeſſed.

The ſixteenth of June, 12 Jacob. the ſaid Executors did enter into the Tenements in the Inquiſition mentioned, whereof the ſaid Meſſuage, five acres of Land, and ten of Meadow are parcell, and did out the Defendant.

The one and thirtieth of Auguſt, 13 Jacob. Robert Faldoe made the Leaſe to the Plaintiff, and they found the Ejectment, and prayed the advice of the Court.

And I conceive Judgment ought to be given againſt the Plaintiff.

For that a Tenant in Taile cannot charge the Land no more then he can alien, 3 Ed. 3. 46. ſo in the 18 Ed. 4. 5. 21. If Tenant in Taile do ſell the Trees and dye, the Vendee cannot have them, and the 17 Aſſ. 21. Tenant in Tail acknowledgeth a Statute and dies, the Iſſue enters, and the Conuſee does ſue execution and enters, and the Iſſue brings an Aſſiſe and recovers, becauſe this is a Diſſeiſin to him, and 11 H. 7. 21. 31 Ed. 3. 22. 14 Aſſ. 3. Tenant in Tail grants a Rent and dies, and the Iſſue enfeoffs a ſtranger, adjudged that he ſhall hold the Land diſcharged, for it was diſcharged by the entry of the Iſſue, and 26 Aſſ. 38. If Tenant in Tail doth charge the Land and dye, and the Iſſue enters and payes the Rent, and then after confirms the Rent, this is good: But in Brook Grants 73. contrary, for the charge was avoided by the entry of the Iſſue.

But admit that this Recognizance ſhall bind the Iſſue in Tail, yet it ſhall not bind the Termer, but he ſhall avoid it, 1 H. 7. 9 7 H. 7. 11. and in the 30 Aſſiſe 10. the Tenant pleads recovery by Action tryed againſt a ſtranger, and did aver the Eſtate of the Anceſtor of the Demandant to be between his Title and the Recovery, the Demandant ſaid, that the ſtranger was enfeoffed with Warranty, and did not plead this, and ſo did Fauxefie, and Judgment was awarded for him.

And although that this Leaſe was made after the Teſte of the Scieri facias, it is not materiall, becauſe the Leſſor had good power to make a Leaſe, and the Land was not ſubject to the execution, and therefore the Leaſe here is good and cannot be avoided, but only by the default of the Leſſor in not pleading the Eſtate-tail, and that is eſpecially aided by the Statute, becauſe the Statute does aid the Leſſee againſt ſuch faigned Recoveries againſt the Leſſor, and it is no Recovery untill the Judgment had, at which time the Leſſee had a good Leaſe not ſubject to the execution, 21. H. 6. 13. & 14. He who comes to the Reverſion, hanging the Præcipe quod reddat againſt the Tenant for life, ſhall be received by the Statute of Weſtm. 2. cap. 3. and 16 H. 7. 5. In a Writ of Entry or Diſſeiſin, he in the remainder does pray to be received, the Demandant traverſeth that he hath nothing in Reverſion at the time of the Writ purchaſed, and could not, for if he purchaſed the Remainder hanging the Writ, he ſhall be received.

And Hill. 14 Jacob. All the Court did agree, that the Leſſee for the Leaſe made after the Verdict againſt the Iſſue in Tail, could not falſifie, wherefore Judgment was given for the Plaintiff. Judgment.

Penſon againſt Mootham.

IN an Action of Covenant, for that by Indenture Tripartite, dated the fifth Decemb. 12. Jacob. It was between Abraham Baker by the name of Abraham Baker Owner of the moyety of a Ship called the Griffell of L. and of the Ship called the Peregrine of L. and of a Pinnace called the Hopewell of L. on the firſt part, and the Plaintiff by the name of H. P. Owner of the other moyety of the ſaid Ships and Pinnace on the ſecond part, and the Defendant by the name of Ja. Mortham Nauteſtrategi dicti Itineris (Anglice) generall of the ſaid Voyage. N. N. B-W. and D. E. by the names of N.G. Naute magiſter dictæ navis vocat le Peregrine B.W. Naute magiſter dict. navis vocat the Griffell, and D.E. Naute Magiſter of the ſaid Pinnace, and ſeverall perſons named in a Schedule annexed to the ſaid Indenture on the third part; It is teſtified and doth appeare, that the ſaid Owners had furniſhed and ſet forth, and the ſaid Victualer had victualed the ſaid Ships as well for Trade as for Diſcovery, and had delivered them to the ſaid Generall, Maſters, and Officers pro itinere faciend. in ſuch manner, and to ſuch an Iſland in the Weſt-Indies, or otherwiſe, as it ſhould be moſt profitable to the ſaid parties, at the diſcretion of the ſaid Generalls, and according to certain Articles of the Commiſſioners, bearing date with the ſaid Indenture, and after their Voyage to return to the Port of London: And that the ſaid Generalls, and each of the ſaid Maſters and Officers ſeverally, for each ones proper and ſeverall part, and not the one for the other, did Covenant for themſelves, their Executors and Adminiſtrators, with the ſaid Owners ſeverally, and their ſeverall Executors, &c. in manner, &c. and that they the ſaid Generalls, or the ſeverall Maſters and Officers, their Executors or Aſſignes, at any time during the ſaid Voyage ſhould go beyond the Cape of Good hope, nor ſhould do or commit any ſpoyle or loſſe to any of the Subjects of our Lord the King, nor to any other perſon or perſons, being ſubject or in ſubjection to any Prince or Principality being in league or amity with our King, nor ſhall do any thing whereby any detriment, prejudice, trouble, or damage may come to the ſaid Ships or Pinnace, or any of them, or to the ſaid Owners or any of them reſpectively.

1. Breach.] And that although the Plaintiff had performed all, &c. yet the ſaid D.E. and the Commiſſioners aforeſaid, in the ſaid Ship called the Hope-well, during the ſaid Voyage, to wit, the eighth day of March, upon the high Sea neer the Iſle of Saint Jago, by force and armes did take and ſpoyle one Spaniſh Frigot laden with Rice, &c. which Ship and Goods were the Ship and Goods of divers perſons who were Subjects to the King of Spaine, the which King then was and yet is in amity and league with the King, and the Defendant and the other Commiſſioners comming to the ſaid Iſland, did divide the ſaid Goods amongſt themſelves.

2. Breach. And that after, Viz. the nineteenth day of June, 13 Jacob. at a Port called Cape Corants beyond the Seas, one Matthew Navale did joyne with the Defendant, and the ſayd Commiſſioners and they together did ſaile to the Coaſt of Champeach in the Weſt-Indies, and did there put a ſhoare the ſaid Hope-well, and three other Ships, and there then upon

upon the high Sea, by force and arms, did take and ſpoyl another Spaniſh Frigot laden with 100 Hides, which Ship, and the goods in her, was the Ship and goods of divers perſons ſubject to the King of Spain, then and yet in league with the King.

And that after, to wit, the 20 Junii, 13 Jacob. at the Town of River de Garta in the Weſt-Indies, the ſaid Defendant and the others, &c. by force and arms did take and ſpoyl another Spaniſh Frigot, laden with 150 Hides, which Ship and goods were the Ship and goods of divers perſons ſubject to the King of Spain, then and yet in league with the King. 3 Breach.

And that alſo then the ſaid perſons, by force and arms, did take and ſpoyl a certain Town beyond the Seas, and from thence did take and carry away twenty Jars of Hony of the Goods and Merchandize of the Inhabitants of the ſaid Town, being ſubjects of the King of Spain, and then and yet in league with our King. 4 Breach.

And alſo there by force and arms did take and ſpoyl another Spaniſh Frigot, laden with 63 Cheſts of Couchineal, and 700 Hens, &c. of the goods of divers perſons, being ſubjects of the ſaid King of Spain, then and yet in league with our King. 5 Breach.

And that the Defendants did not come to the Port of London after their return, &c.

And concluded that the Defendant did not keep his Covenant to make no ſpoyl, or to do any act, whereby any detriment ſhould come, &c. ad damnum 3000 l. &c.

The Defendant, as to the ſaid five firſt Breaches did demur in Law, becauſe they were not alledged in ſuch manner as any iſſue or tryal may be had.

And as to the other, he pleaded that the Plaintiff did prohibit him from coming to London.

And it ſeems that Judgment ought to be given upon the demur againſt the Plaintiff.

For firſt, there is no covenant to binde the Defendant, for the words are, & prædictus State-General both covenant, and there is no other name in the Covenant given to the Defendant, and that is not ſufficient to binde him: 1. Becauſe he is not named State-General before, but Naute Strategeneral. 2. This is no parcel of his name before, or addition, but is as his title, or is a pronomen, and that is not ſufficient, for the pronomen is but as an alius dictus. 5 Ed. 4. 141. Alexander Cock, Clericus, alius dictus A.C. nuper de D. in Comitatu, &c. Clerico is no good addition, becauſe there is no addition but in the alius dictus. And Dyer 119. Robert Thrower brought an Action of Debt upon a Bond by the name of Robert Thrower, otherwiſe called Robert Throner, Keeper of the Kings Gaol at Ludgate, and the Defendant pleaded the Statute of 23 H. 6. 1. And it was adjudged, that it ſhall not be preſumed that he was Gaoler, for it may be falſe. As a Bond of I. S. Son and Heir of I. S. yet he may be a Baſtard, and a Bond by A. the Wife of I. S. who is ſole, is good notwithſtanding. And Dyer 304. B. in an Ejectment the Plaintiff declared of a Leaſe of 100 acres of Land, by the name of the Manor of D. habendum the Manor and the premiſſes, &c. whereupon he entered into the Manor and premiſſes. Quære. If it be good, and agreed to be ſufficient by the word premiſſes. 1.

There is no breach aſſigned, for as to the firſt breach, that is onely that D. E. and his company did take, &c. a Spaniſh Frigot, and that 2.

is no breach of covenant in the Defendant, for that the covenant is not ſeveral: as in the 5 Rep. Slingsbies Caſe: If a Leaſe be made of W. acre to I.S. and a Leaſe of B. acre to I. D. and the Leſſor covenants with them, and either of them, that he is owner, &c. each of them ſhall have an Action of Covenant according to their ſeveral intereſts: ſo in caſe of a warranty, but otherwiſe where the intereſt is joynt. Vide 5 Rep. Mathewſons Caſe. And ſo here, the Covenant of the Defendant doth extend onely to himſelf and his Ship, and not to D. E. and his company: and the allegation, that the Defendant and his company did come to the ſaid Iſland, and divided the goods, is nothing to the purpoſe; for it may be they bought a moyety thereof, or any part of them, and ſo they might lawfully divide them. 27 Aſſiſ. 69. In an Appeal, for that one did receive ſtoln goods, knowing of the Felony, adjudged not good.

And as to the ſecond breach, it is not alledged that the ſpoyl was made during the Voyage, and if it were not during the Voyage, it is no breach: and in as much as the Plaintiff hath not ſet forth that it was done during the Voyage, it ſhall be taken moſt ſtrongly againſt himſelf. 26 H. 8. Pleadings 6. 3 H. 7. 2. Dyer 89. And ſo in all the other three breaches it is not alledged that it was done during the Voyage.

3. It does not appear that theſe goods thus taken were the goods of the Subjects of the King of Spain at the time of the taking of them, but onely quod fuerunt bona: which doth denote a time paſt, and doth not import any preſent property; and it may be very probable that they were their goods, and that they were bought of them by ſome perſons under the obedience of a King, not in amity with our King, and then it is no breach; for [fuerunt] is ſo uncertain, that it may be 20 or 40 years paſt.

4. Alſo it is declared, Quod fuerunt bona diverſarum perſonarum exiſtentium ſubditorum Regis Hiſpaniæ: the which word [exiſtens] doth refer to the time of the Declaration, and not to the time of the taking; for although in the 27 of H. 8. 15. and 28. that the word [exiſtens] in Deeds may, in reſpect of the ſubject matter, be applyed to the future time, yet in all courſe of pleading it ſhall be taken for the preſent time; as in an Indictment upon the Statute of 8 H. 6. for forcible entry into Land, Exiſtens liberum Tenementum I.S. is not good, becauſe it doth refer to the time of the Indictment, and not of the entry.

And ſo in the 21 H. 7. 30. A condition to diſcharge one of all Eſcapes of all Priſoners in the Gaol, this ſhall extend onely to Priſoners at the time of the Obligation made. And it may very well be, that they were the Subjects of one who was not in league with the King at the time of the taking, and yet may be at the time of the Declaration the Subjects of the King of Spain.

5. I conceive, that the Plaintiff ought to alledg, that theſe ſpoyls were to the damage of the Plaintiff.

6. I conceive, that he ought to have named one of the Subjects of the King of Spain, and not to leave it ſo uncertain to the Jury, as to have them charged to enquire of all his Subjects, for the Plaintiff takes notice of the perſons, that they were the Subjects of the King of Spain, and therefore he may as well know their names. Dyer 99. & 285. An Indictment of Murder of one unknown, or ſtealing the goods of one unknown, is good, becauſe he may be diſcovered.

And after the Plaintiff diſcontinued his Suit.

Holland

Holland and others againſt Jackſon and others.

RIchard Holland and Margaret his wife, one of the daughters and heirs of the body of Sir Robert Langley, Knight, and William Dauſey and Ann his wife, the other daughter of the ſaid Sir Robert, brought a Writ of Error to reverſe a common Recovery had at Lancaſter, die Lunæ, 13 Elizab. In a Writ of Entry ſur Diſſeiſin in the Poſt, between the ſaid Francis Jackſon and Henry Oyden Plaintiffs, and Robert Leigh and James Haye, Tenants of 22 Meſſuages, 10 Cottages, 20 Tofts, 22 Gardens, 20 Orchards, 300 acres of Land, 200 of Paſture, 40 of Wood, 500 of Furze, 100 of Turbary, &c. with the appurtenance, in Alkerington and Preſtnitch, wherein the Tenants did vouch Thomas Leigh and Katherin his wife, who did appear by George Butler their Attorney, who entred into warranty, and did vouch William Forſter preſent in Court, who did warrant, &c. ad damnum, &c. for that before the purchaſe of the ſaid Writ of Entry, and ſince the 27 H 8. Sir Robert Langley was ſeiſed in fee of the ſaid Tenements, and thereof did infeoff Thurſton, Tilſley, Fitton, and Hopwood in fee, to the uſe of himſelf for life, and after to the uſe of the ſaid Katherin in T. the remainder to the uſe of the right heirs of the body of the ſaid Sir Robert, the remainder to the uſe of his heirs.

Sir Robert was ſeiſed for life, with remainders over, &c. and then Sir Robert dyed ſeiſed, after whoſe death the ſaid Tenements did remain to Katherin in Tayl, the remainder to Katherin and the Plaintiffs, Margaret and Ann, and one Dorothy, as daughters and heirs of the body of Sir Robert; the Reverſion to the ſaid daughters and their heirs: whereupon Katherin did enter, and was ſeiſed in Tayl with Remainders as aforeſaid, and did marry Thomas Leigh, whereupon the ſaid Recovery was had in manner and form as aforeſaid, after which Recovery Thomas Leigh and Katherin did dye, without iſſue of the body of Katherin, and Dorothy dyed alſo without iſſue, whereby the right of the ſaid Tenements did remain to the ſaid Margaret and Ann, as daughters and heirs of the body of the ſaid Sir Robert.

The Writ of Recovery was certified, and the Plaintiffs aſſigned Error; for that Katherin was within age at the time of the appearance of her and her Husband by the ſaid Attorney, and was within the age of 21 years at the time of the Judgment (to wit) of the age of eighteen years, and no more.

Hereupon a Scire facias was awarded againſt the Recoverors, who being returned dead, a Scire facias was awarded againſt the heirs and Ter-tenants, whereupon Ambroſe Jackſon was returned ſon and heir of the ſaid Jackſon; and Thomas Hulm, and Margaret his wife, and Iſabel Ogden, daughters and heirs of the ſaid Ogden, and William Ogden and others were returned Ter-tenants; and the heirs and Ter-tenants did appear, and pleaded ſeveral Pleas, ſome to the Writ, and ſome in Bar, and after, the Writ of Error was diſcontinued.

Hillar. 11 Jacob. The Plaintiffs purchaſed a new Writ of Error of the ſaid Tenements (omitting the Rent) and aſſigned the ſaid Error: whereupon a Scire facias was awarded againſt the Heirs and Ter-tenants, which was returned, (to wit) that Margaret Hulm was dead without iſſue, and thereupon a Scire facias was directed to the ſaid Jackſon and Ogden, the Heirs, &c. and Katherin Leigh, and Robert

bert Leigh, and fourty other Ter-tenants, who did appear, and thereupon: Whereupon the ſaid Ezror was aſſigned.

The Ter-tenants did plead, that John Chatterton was Tenant of a Cottage, &c. in A. aforeſaid, parcel of the ſaid Tenements.

The Heirs pleaded in null. eſt errat.

The Plaintiff did acknowledg the Plea of the Ter-tenants, and thereupon a Scire facias was awarded againſt John Chatterton, who did appear, and the Plaintiff did aſſign the ſaid Ezror: whereupon Jane Jackſon one of the Ter-tenants did plead, that Katherin was of full age, &c. whereupon iſſue was joyned.

And George Chatterton and ten others of the Ter-tenants did plead non-tenure.

And the Heirs of the Recoverors did plead in null. eſt errat.

And Mary Taylor did plead, that before the Recovery, a Fine was levyed the 4 Septemb. 13 Elizab. between the ſaid Robert Leigh and James Haye Plaintiffs, and Thomas Leigh and Katherin his Wife, Deforceators of the ſaid Tenements: whereupon the ſaid Thomas and Katherin did acknowledg the ſaid Tenements to be the right of the ſaid Robert, &c. with warranty againſt them and the Heirs of Katherin; which Fine was proclaimed, &c. and was to the uſe of the Conuſees and their Heirs, until the Recovery ſhould be perfected: and then the ſeventh of March, the 13 Eliz. the Writ of Entry was purſued, which was to the uſe of Thomas and Katherin his Wife in Tayl, the Remainder to Thomas and his Heirs.

Thomas and Katherin did demiſe to the ſaid Mary a Cottage and three acres of Land, parcel of the ſaid Tenements, for life, &c. wherefore ſhe did demand Judgment of the Writ againſt the Fine with proclamations.

Robert Leigh and 28 others of the Ter-tenants did plead the ſaid Fine with warranty, and that Katherin dyed without iſſue, and that Thomas was ſeiſed in fee, whoſe eſtate they have, and that Thomas dyed, and that after the death of Katherin, the ſaid warranty did deſcend to Margaret and Ann as ſiſters and heirs of Katherin, and did demand Judgment if they ſhould maintain this Writ againſt the ſaid Fine, and againſt the warranty.

The Plaintiffs, as to the ſaid ſeveral pleas of non-tenure, in null. errat. the fine with proclamations, and the warranty, did ſeverally demur in Law, to which the Defendants did ſeverally joyn.

And I conceive that the Writ of Ezror does well lie, and that the Recovery is erroneous, and therefore ought to be reverſt.

And for the Argument of the Caſe, I ſhall divide it into three parts:

1. If the Writ of Ezror will lie? 1. In reſpect of the Plaintiffs: 2. Notwithſtanding the plea of non-tenure pleaded in abatement thereof by Chatterton and ten others of the Ter-tenants.

2. Whether there be any Ezror in the Recovery? and if it be ſuch an Ezror as the Plaintiffs may aſſign?

3. If the Plaintiffs be barred thereof by the pleas in Bar, to wit, the Fine with proclamations pleaded by Mary Taylor, and the warranty pleaded by Robert Leigh and 28 others of the Ter-tenants, or by any of theſe pleas, or not?

And as to the firſt, If he in remainder, depending upon an eſtate in Tayl, may maintain a Writ of Ezror to reverſe a Recovery againſt the firſt Tenant in Tayl, after his death, without iſſue. And I conceive

ceive clearly, that he in the remainder shall have a Writ of Error; for the Writ of Error doth always pursue the nature of the Land, and not the privity of the blood.

And therefore 5 H. 8. the Writ of Error shall go with the Land, and therefore the Heir in special tayl shall have it, although there be another Heir at the Common-Law. And so in Fitz. Herb. N. B. 21 E. He who is Heir to the Land that is lost, shall have a Writ of Error, and not the Heir at Common-Law: as if Land in Borough-English be lost by erroneous Judgment, the younger Son shall have a Writ of Error: and 3 H. 4. 19. The Heir in special tail shal have the Writ of Error, although there be another Heir at the Common-Law. And 1 Mariæ, Dyer 90. Verneys Case: The Writ of Error shall be brought by him who had the thing wherein erroneous Judgment was given.

And as the especial Heir shall have the Writ of Error, so shall he also in remainder or reversion upon an Estate for life, after the death of the Tenant for life. 4 H. 8. 21 H. 6. 19.

But the sole Objection, that hath any colour against this was, that this Writ of Error ought to be given to him in remainder by the Common-Law, for it is not given by the Statute of the 9th of Rich. 2. and then there can be no remainder upon an Estate-tail at the Common-Law, and therefore he in such remainder cannot have any Writ of Error. Object.

But this is easily answered, for the Common-Law being, that when an erroneous Recovery is had against a particular Tenant, that he in the Reversion or Remainder shall have a Writ of Error after the determination of the particular Estate, it follows, that when this new particular Estate is made by the Statute of Westm. 2. he in the remainder shall have the same remedy. And this is proved by the case of the Tenant in Tayl, for although that his Estate was not at the Common-Law, yet now he shall have all Actions which the Common-Law gives to a Tenant in fee, which may stand with his Estate, and therefore he shall have a Writ of Cuttheat, a Quod permittat: Nat. B. 124. 4 Ed. 3. 48. Nat. B. 212. and so he shall have an Assize, and many other Writs, which lie for a Tenant in fee at the Common-Law. Answer.

And for Authorities in this point, Dyer 188. That he in the remainder after the Estate-tail spent, shall have a Writ of Error, and so is it in Dyer 40. in Verneys Case. And in the 3 Rep. fol. 3. It is resolved, that he who hath a remainder expectant upon an Estate in Tayl, shall have a Writ of Error upon a Judgment given against the Tenant in Tayl, although there were no such remainder at the Common-Law; for when the Statute de Donis Conditionalibus does enable the Donor to limit a remainder upon the Estate-tail, all actions which the Common-Law doth give to the privies in Estate, are by the same act as incidents tacitly given also according to the rule of the Common-Law: and therefore as he in Reversion or Remainder upon an Estate for life, shall have a Writ of Error by the Common-Law upon a Judgment given against a Tenant for life, although that they were not parties by Hyde, Pryer, Voucher, &c. so since the Statute de Donis conditionalibus shall he have, who hath a Reversion or Remainder expectant upon an Estate in Tayl. And therefore I conceive the Writ of Error is good, notwithstanding that Objection.

But

But now it is to be conſidered, if this Plea of non-tenure ſhall avoyd the Writ of Error? and I conceive it will not, for three Reaſons: 1. I conceive that it is no plea to abate the Writ, for the Plaintiffs might have reverſed the Recovery againſt the Leſſors of the Reverſion onely, without having made the Ter-tenants parties; for the Writ of Error being grounded upon the Recovery, does always lie againſt the parties to the Judgment, and their Heirs, and may be reverſed againſt them, although they have nothing in the Land: and this is clear by Nat. Brev. 107. and 26 Aſſiſ. 12. A Writ of Error does lie againſt him who recovers, and after the Error found, a Scire facias ſhall iſſue againſt the Tenant: and 42 Aſſiſ. 22. and 44 Ed. 3. and 10 Ed. 4. 13. Non-tenure is no plea in a Writ of Error, for the party to the Judgment or his Heir. And here in this caſe, if thoſe who have pleaded Non-tenure are not Tenants, they are at no loſs, for they can loſe nothing; but this plea does diſcharge themſelves onely, and the Scire facias remains good againſt the Heirs, and the other Ter-tenants.

2. If Non-tenure could be a good Plea for the Ter-tenants in a Scire facias, yet at the leaſt it ought to be in ſuch a Scire facias wherein the Ter-tenants are named, and not in ſuch a general Writ as this is. For here the Plaintiffs have purſued their Scire facias in as good a form as may be, viz. generally againſt the Heirs and the Ter-tenants; and if there be any default, it is in the Sheriff who hath returned thoſe to be Tenants who indeed are not ſo, and it ſhall be very hard if the Writ ſhould abate for default of the Sheriff. 20 Ed. 3. Scir. facias 121. In a Scire facias on a Recognizance againſt the Ter-tenants, it was ſaid that one of them that were warned had but a Leaſe for years of ſuch a one who had the Freehold. Judgment of the Writ, &c. And there Birton ſaid, That the Sheriff had a general command to warn the Ter-tenants, wherefore this is no Plea to the Writ. And Hill and Wilby anſwered that it was otherwiſe, for that the Plaintiffs at their peril ſhould name the Ter-tenants in their Writ: whereupon there was a new Writ.

Whereupon I obſerve that if the Writ be ſpecial, naming the Ter-tenants, as it was anciently, then it ought to be ſo: but of late ſuch courſe hath been changed, as appears by the 8 of H. 4. 18. and the Writ awarded generally, and therefore ſuch ſpecial Non-tenure ſhall be a good Plea, for it is the default of the Plaintiff to purſue his Writ againſt one who is not Tenant, but when the Writ is general, Non-tenure is no Plea to the abatement of the Writ. 48 Ed. 3. 15. 8 H. 18. 48 Aſſiſ. 2. and the 2 H. 4. 18. B. In a Writ of Account againſt the Sheriff of Northumberland of a Receit in Newcaſtle upon Tine; and it was pleaded that Newcaſtle was a County of it ſelf: but becauſe it was made a County ſince the Teſte of the Writ, the Writ was adjudged to be good.

3. Theſe Ter-tenants are eſtopped to plead Non-tenure, becauſe that they with the reſidue, at firſt did plead that John Chatterton was Tenant of parcel of the Land, by which Plea they have taken upon themſelves to be Tenants of the Land, and therefore they cannot afterwards plead Non-tenure. 41 Ed. 3. 4. In a Præcipe quod reddat againſt I. S. who pleaded to the Writ, and the Writ abated, whereupon the Writ did abate, and a new Writ brought for Jornies Accompts againſt I. S. he ſhall not plead Joyntenancy with the other, becauſe he hath admitted himſelf ſole Tenant by the firſt Writ. 33 H. 6. 3. In a Formedon againſt the Husband, who pleaded Joyntenancy with

with his wife, for which the writ abated, and a new writ was purchaſed againſt the husband and wife, who pleaded non-tenure, and adjudged a good plea for the benefit of the wife, but if the laſt writ had been againſt the husband only, he could not have pleaded non-tenure.

22 H. 6. 34. B. In a Præcipe quod reddat, the Tenant pleaded Non-tenure, the Demandant ſaid, that before he brought another Writ againſt the Tenant, and I. S. who made default, for which a Grand Cape was awarded, upon which I. S. made default, and the now Tenant ſaid, that he was ſole Tenant, and waged his Law of Non-ſummons, which the Demandant did acknowledge, whereupon the writ abated, and this Writ purchaſed by Journies Accounts, and there it is argued if he ſhall have advantage of this, becauſe the firſt Writ did abate by his own default, but it was agreed, that if he could have ſuch advantage, the Tenant ſhall be ſtopped to plead Non-tenure, and adjudged that the Tenant ſhall anſwer.

42 Ed. 3. 16. In a Præcipe quod reddat, one took the ſeverall Tenancy on his part, and the other of the other part, and they were ſtopped becauſe that a former proces was againſt them and others, and they took the entire Tenancy upon them, without that, that the others had any thing, and did gage their Law of Non-ſummons, wherefore the firſt writ did abate, and this writ purchaſed by Journies Accounts.

And ſo in our Caſe, when all the Tenants have pleaded that I. S. was Tenant of parcell not named in the returne, they have taken the Tenancy upon them, and therefore they cannot afterwards plead Non-tenure.

And now (the Writ being maintainable notwithſtanding theſe exceptions) it is to be conſidered whether there be any error in the Recovery, or not.

And I conceive clearly that the appearance of the Wife within age by Attorney, is Error; for by the Rule of the Common Law, in every Præcipe quod reddat, whereby Land is demanded, if the Tenant appear he ought to appear either in perſon, or by one lawfully authorized by him, and that is the reaſon that if Judgment be given againſt one upon an appearance by the Attorney, where the Attorney had no Warrant to appear, that this is Error, untill it be remedied in caſe where a Verdict is paſt by the Statute of 32 of H. 8. of Repleader, but if the Judgment be given upon default or demurrer, or upon a Verdict, and no Warranty by him who recovered, this is not Warranted by the Statute, Dyer 93. 20 Eliz. Dyer 363. and the reaſon is, becauſe that the Land or thing in demand is loſt or gained by one who had no Warranty, and then the Rule of Law is, that an Infant ſhall not appeare by Attorney, and 1 H. 5. 6. adjudged that an Infant cannot be Attorney for another: and ſo therefore it is there ſaid, that he cannot appear by an Attorney, 22 H. 6. 31. b. There by Newton, if an Infant ſue by an Attorney it is Error: And the Law in this caſe ſtands with great reaſon, for the Warrant of Attorney is made by the Infant, which although it be ſufficient when it is of full age, yet it ſhall be dangerous to permit Infants to loſe their Land by their Attorney, while they have not diſcretion enough to chooſe ſuch who ſhall be faithfull to them, and therefore the Law hath made better proviſion for them (to wit) that they ſhall appear by their Gardian admitted and allowed by the Court, ſo that in regard of the imbecility of the Infant, the Court makes choyce of a ſufficient & truſty perſon to plead and defend their cauſe, Nat. Br. 27 H. 1. an Infant ſhall ſue by his next friend, but if he be Defendant in any Acti-

...he shall make defence by his Guardian, and not by his next of kin, and the Court does assigne a Guardian for an Infant who is Defendant, and that is commonly one of the Officers of the Court: and in 21 H. 6. 31. where Hungerford and his Wife brought an Action of Trespasse for taking of their Villain being in their Service: The Defendant pleaded that he was free, &c. and as to the losing of the Service that he was not retained, and found for the Plaintiff, and several damages, viz. for the taking of nine and twenty pounds, and for the losing of the Service twenty shillings. And it was argued whether Judgment should be entred, because the Retainer was not found: And Mr. Markham moved that the Plaintiffs being within age did appear by their Attorney, and did declare, that all the wages continued by the Attorney, whereas it ought to have been by their Guardian, so that all was Error. And Newton said, that if it were so, there was good reason to have a Writ of Error, and after the Plaintiffs released the twenty shillings, and had Judgment of the other.

So that an Attorney being alwaies made by the party, ought to be therefore made by one of ability to give such Authority, which ability cannot be in an Infant, for all Authorities made by an Infant are utterly void.

And that the appearance of an Infant by Attorney in any Action, is Error, does appear by the said Book of the 21 H. 6. 31. 9 Eliz. Dyer 262. b.

Object. But it may be objected that the Husband in this case is of full age, and therefore he may make an Attorney for himself and his Wife.

Answer. But I answer that the Law is not so, for the Rule of Law is, that the Husband cannot give away or lose the Inheritance of his Wife, but it must be given or lost by her her self and by her own act, and therefore if the Inheritance in this case belong to the Wife, she is the principle, and only to be taken notice of, and she ought to appear in such manner as the Law hath appointed in regard of her nonage, 14 Ed. 3. Age 88. In a Cessavit against the Husband and Wife, the Husband did appear by an Attorney, and the Wife by her Guardian, and upon suggestion that she was of full age, the Guardian was bidden to bring her into Court, to see whether she were of age or not.

29 Assise 67. In an Assise against Husband and Wife, the Husband did answer as Tenant, and the Wife would not, but the Husband said that his Wife was within age, and that she was taken away, but did not say by whom, and he did appear for himself and his Wife as her Guardian, and pleaded in Bar: and one of the Counsell said, that the Wife had made default which is the default of the Husband, and because that he answered as Guardian without Warranty by Record in this Court to do the same, Judgment, &c. And there Thorp said, that he ought to have a Warranty in such case; wherefore the Assise was awarded.

35 H. 8. 56. In a Writ of Right by the Husband and Wife (the wife being within age) and she appeared by her next of kin, and was admitted by the Court.

New Book of Entries 256. In a writ of Error to reverse a Fine by Maurice Pierce, and Joane his wife, and John Pierce and Elizab. his wife, the three first appeared in person, and Elizabeth being within age, by one Laurence Gibson her Guardian, and admitted by the Court.

And so in this Case, forasmuch as the Land is the Inheritance of the wife which is demanded, which she will lose by this Recovery, she ought to appear by her Guardian, notwithstanding the full age of the husband

band who is joyned only for form sake with his wife.

30, & 31 Eli. Morseby against Charnock, The husband and wife levied a Fine, and after this was reversed by Error, because that the wife was within age, the husband shall not have the Land, for all the Estate passeth from the wife, and the husband joyned only for conformity, Coke 2. Rep. Cromwels and Beckwiths Case.

But it may be objected also, that this Error concerning the nonage of the wife is so appropriated to her person in privity, that no stranger can take any advantage thereof. Object.

I conceive not so, for the constituting of an Attorney is utterly void as to the wife, and therefore every stranger shall take advantage there, as is not like the Case where an Infant makes a Feoffment which is but voidable, and therefore the Lord by escheat nor any stranger shall not avoid it. Answer.

22 H. 6. 31. The Plaintiffs within age did sue by an Attorney, and there it was ruled that the Defendants might have a Writ of Error, and placit. 37. Eliz. Rot. 253. Bartholomew brought a Writ of Error against Dighton, for that Dighton recovered against him in an Action of false Imprisonment, in which he being within age did sue by an Attorney, and adjudged that Judgment should be reversed.

And this Case is not to be resembled to the Case of a Fine levied by an Infant which cannot be reversed by any but by the Infant himself, and the same Law is of a Recognizance by an Infant, and the reason of these Cases is, because it is the Act of the Court, to admit him to levy a Fine, or to acknowledge a Recognizance, and therefore this ought to be reformed by the Court, and that must be by inspection of the Infant, and therefore it ought to be done during nonage.

But the nonage in this Case ought to be tryed per pais, as it was adjudged in the said cases of Bartholomew and Dighton, and the case of Hobbs, in which case the Infant was brought to the Bar to be inspected, but adjudged by the Court that it should not be so, because the matter was tryable per pais: and 10. Rep Mary Portingtons case, A common Recovery against an Infant, although he appears by his Guardian shall not bind him, for an Infant hath not such a disposing power of his Land, as the Husbands & wife have, but is utterly disabled by the Law to transfer or convey his Inheritance or Freehold to others during his minority: And of late dates, a common Recovery does appear to be a common conveyance and assurance of Land.

The third part of the Case is, If the two matters pleaded in Bar of the Writ of Error, or any of them, be sufficient, or not: I conceive not. 3. Part.

And first, as to the Fine, with Proclamations levied before the Recovery had, which is the Plea of Mary Taylor, one of the Tertenants, I conceive that it is utterly insufficient, as well for the manner as the matter of the Plea; for she hath disabled her self to plead this Plea, for she sets forth that the twentieth of May, 31 Eliz. Thomas Leigh and Katherine his wife, did let to the said Mary a Cottage and three acres of Land (parcell of the Tenements expressed in the Fine and Recovery) for life, but doth not shew in what Town the said Cottage and three acres do lye, wherefore the Plea is altogether uncertaine and insufficient, for the Tenements in the Recovery do lye in two Towns, viz. In Alkington and Prestwick, and it doth not appear by this Plea, in which of these the Cottage and three acres do lye.

5 Ed. 4. 116. b. In a Formedon in Discender of a house and forty acres

of Land, and 6r of Wood in three Towns, and the Iſſue being to be tryed, the Tenant ſaid, that the Demandant had entred into the houſe and thirty acres of Land, and three of wood: And by the Court the Plea was naught, becauſe it did not appear in which Town the Entry was.

And in Moore and Hoskins caſe in the Exchequer, 8 Jacob. In an Ejectment of Land in Overkiddington and Netherkiddington, the Defendant pleaded not guilty, and when the Iſſue came to be tryed by Niſi prius, in the County of Oxon, the Defendant pleaded an Entry of the Plaintiff in three acres of the Land, contained in the Declaration ſince the laſt Declaration; wherepon the Plaintiff demurred and adjudged that the Plea was inſufficient, and therepon the Plaintiff had Judgment to recover.

Secondly for the matter, this Fine being precedent to the Recovery whereby the cauſe of this Action is given, cannot extinguiſh it: for it is a Rule in Law, that one cannot give or grant that which one hath not, 22 H. 7. Kelway 84. If the eldeſt Son in the life-time of his Father inſeoffs another, it is void as to bind the Land: and Littleton, Releaſes 106. Theſe words in a Releaſe (Quæ quo vis modo in futuro habere potero, are void in Law, for no Right doth paſſe but only the Right which the Releaſor had at the time of the Releaſe, as if the Son releaſe to the Diſſeiſor of his Father all the right which he hath or may have, and the Father dye, the Son may enter becauſe that he had no right in the life of his Father, but only a deſcent to him after the Releaſe by the death of his Father, 13 Ed. 1. 10 Ed. 2. and 4 H. 7. cap. 24. It is enacted that Fines with Proclamations ſhall conclude as well Parties as Strangers, ſaving to the ſtrangers ſuch right, claim, and intereſt as they had at the time ingroſſed, ſo as they purſue their claim by entry or action within five years next after the Proclamations and ſaving ſuch Action, Right, Title, Claim, and Intereſt, as firſt, Shall grow, remain, deſcend, or come after the Fine and proclamations, by force of any Gift in Tail, or by any other courſe and matter had and made before the ſaid Fine levied, ſo as they purſue within five years, &c. By which it appears that nothing is ſaved to the ſtrangers but rights, actions, and intereſts, ariſing by force of any cauſe or matter before the Fine, and therefore nothing is barred by the Statute but former rights, for what ever right is barred as to the Parties, is ſaved to the ſtrangers, ſo as they purſue their claim within, &c.

Sir Richard Shuttleworths Caſe between Barton and Lever, 37 Eliz. Tenant in Tail levied an erronious Fine with Proclamations, and then as Mountbee did ſuffer an erronious Recovery and died, the Iſſue brought a writ of Error to reverſe the Fine, the Defendant pleaded the recovery afterwards, and the Plaintiff to maintain the writ did alledge a default in the Recovery, whereby he conceived the ſame to be void, but reſolved that it was but voidable by a writ of Error, and therefore ſo long as it was in force the Iſſue was barred to reverſe the Fine: And therefore it was agreed there, that the Iſſue ought firſt to reverſe the Recovery by writ of Error, and then he may reverſe the Fine.

And ſo in our Caſe if the Plaintiffs ſhould be barred in the writ of Error by the Fine, they ſhall be without remedy, although that the Fine be erroneous, as I conceive it to be, for if they bring a writ of Error to reverſe the Fine firſt, the Recovery although it be erroneous will be a clear Bar to them as it is adjudged in the ſaid Caſe of Barton and Lever.

7 H. 4. 40. a. One brought a writ of Error to reverſe an Outlawry, the Attorney

Attorney said he was outlawed at the Suit of another. Hulls said there, that he could not be received, for when one is to annull an Outlawry, he shall not be disabled by another Outlawry, although he be twenty times outlawed, for then it will follow that there shall be delay infinite, 26 Ed.3.66. Tenant in ancient Demesne levies a Fine at the Common Law, and after does levy another, and the Queen being seignioresse of the Mannor, did bring a Writ of deceit to reverse one of them, she shal not be barred by the other, especially by the first to reverse the second.

And as to the Warranty, I conceive that it is no Bar for many reasons; 2. Matter of the Bar.

1. Because Warranties do bind only Rights and Actions which are in esse at the time of the warranty made, and not Rights and Actions which do accrue after the Warranty created, but this Writ of Error is given to the Plaintiffs in respect of the erroneous Recovery, which was suffered after the creation of the warranty, and therefore the warranty is no Bar to the Plaintiffs to have this writ of Error, 30 H.8. Dyer 42. B. All the Justices did agree, that when a man does bind him and his Heirs to warranty, they are not bound to warrant new Titles of any Actions accrued since the warranty, but only such Actions as are in esse at the time of the warranty made, 12 Assise 41. The Tenant in a Precipe quod reddat made a Feoffment hanging the writ, and after the Demandant had recovered by erroneous Judgment, notwithstanding that the Feoffment had excluded the Tenant from his Right to the Land, yet this shall not exclude him from his writ of Error which is accrued to him since the Judgment given after the Feoffment, Vide, 18, & 19 Eliz. Dyer 353.

But it may be objected that this warranty shall bind the Right of the Plaintiffs to the Land, for although the Recovery be reversed, yet the Plaintiffs shall be put to their Formedon to recover this Land, in which they shall be barred by this warranty, and so it shall be in vains for them to reverse the recovery, for by the warranty they shall be barred to have the Land. Object.

I answer, That notwithstanding the Collaterall warranty, yet a Right doth remain in the Plaintiffs, which is bound by the warranty, which Right is taken away from the Plaintiffs by this Recovery, by which the Law would have given to them a Remedy (which is by writ of Error) to be restored to their Right, for a collaterall warranty doth not extinguish the right of him who is bound by the warranty, but only does bind the Right for the time that the warranty remains undefeated, and this is proved by many Authorities, 34 Ed.3. Droit.29. If the Tenant in a writ of Right hath collaterall warranty of the Ancestor of the Demandant, he ought to plead it, and not to conclude upon the Right, for if he conclude upon the Right, it shall be found against him, because the warranty doth not give or extinguish the Right, but only binds it. Answer.

43 Assise 44. A collaterall warranty may be defeated by a Deed of Defeasance made after the creation of the warranty, by which it appears that the Right is not extinguished, for if so, it could not be revived by the Defeasance, and with this agrees 43 Ed. 3.20. Earle of Staffords Case.

19 H.6 59.B. Fortescue, A collaterall warranty does not give Right, for if Land be given to one and the Heirs Males of his body, and he hath two Sons, and doth alien, and the collaterall Ancestor to the Son doth release with warranty to the Alinee, and dies, and the Donee dies, now is the eldest Son barred, but if he die without Issue Male, leaving Issue a Daughter, the younger Son shall not be barred by the warranty.

24 H.8.

24 H.8.B. Formedon 18. If Tenant in Tail hath two Sons by ſeveral venters, and dies, and the Anceſtor collaterall of the elder Son doth releaſe with warranty, and dies without Iſſue, and the elder Son dies without Iſſue, the younger Son ſhall recover by a Formedon, becauſe he is not Heir to the warranty: And Littleton 160. B. Tenant in Taile hath three Sons and diſcontinues, the ſecond Son releaſes to the Diſcontinuee with warranty, the Tenant in Taile, and the ſecond Son dies, now is the eldeſt Son barred becauſe the warranty is collaterall to him, but if he die without Iſſue, the younger may have a Formedon and ſhall not be barred by the warranty, becauſe that the warranty as to him is lineall, and to this purpoſe is the 8. of Rich. 2. Warranties 101. By which Book it does appear that the Eſtate-tail is not erring by the warranty, for if it could be ſo it can never be revived again.

II. This warranty is executed and determined, for it was made to the Conuſees againſt whom the Writ of Entry whereupon this Recovery was had, was brought, and they did vouch to Warranty Thomas Lea and Katherine his wife who made this warranty, and thereupon they have recovered in value, wherefore this Warranty is utterly determined.

23 Edw. 3. Recover. in value 12. If one upon a warranty vouch and recover in value, and then is impleaded of the Land recovered in value, he ſhall not vouch againe, becauſe the warranty was once executed.

III. The warranty is determined by the reverting of the Eſtate to whom it was annexed, for when Katherine died, Thomas Lea was to warrant the Land to the Conuſees, and after his death he had the Entire Fee-ſimple of the Land: 22 of Edward the third, 1. In Dower, by Nicholas Powes and his wife, the Tenant vouched A. who was ready in Court, & demanded what he had to bind him to warranty, who ſaid, that the ſaid A. & B. his wife had rendred to him the ſaid Tenements by Fine, and obliged them and the Heirs of the wife to warranty, and ſaid that the wife was dead, and had a Son and Heir who was liable to the warranty before him; Judgment of the Voucher, and the Court held the Vouchment good.

Whereby it appears, that after the death of Katherine, Thomas was bound to this warranty, and by his death he had a Fee-ſimple, whereby the warranty is deſtroyed. Littleton 169. If Tenant in Taile enfeoffs his Uncle who enfeoffs A. with warranty, A. re-enfeoffs the Uncle in Fee, who enfeoffs a ſtranger in Fee, and dies without Iſſue, the Tenant in Taile dies, the Iſſue ſhall not be barred by the warranty of the Uncle, becauſe he does re-take to him as great an Eſtate of his firſt Feoffee to whom the warranty was made, as the ſaid Feoffee had from him, and the cauſe why the warranty is defeated in this Caſe is, becauſe if the Warranty be in force, then the Uncle ſhall warrant it to himſelf, which cannot be.

And in one Caſe the Mer-tenants do claime the Eſtate which Thomas Lea had, and therefore they cannot have a greater advantage by the warranty then he had. Nat.B. 135. If one enfeoffs another with warranty, and the Feoffee enfeoffs another, and re-takes the Eſtate in Fee, the warranty is determined, and the 22 H. 6 22. b. accords with this, becauſe he is in of another Eſtate.

And depending the Writ of Error (Viz.) Trinit. and Michaelm. 14 Jacob. One of the Plaintiffs in the Writ of Error did dye, which

which was pleaded by the Defendants Michaelm. 14 Jacob. whereupon the Writ of Error was abated.

Hillar. 13 Jacob. Robinson against Matthew Francis Administrator of Alban Francis. Rot. 542.

In an Action of Debt on a Bond, of 100 l. made the first of August, 1 Jacob.

The Defendant pleaded, that the Intestate 20 November, the 11 Jac. was bound to Elizabeth Francis in 100 l. which was unpayd at the death of the Intestate, and that Elizabeth married John Pennial, John and Elizabeth brought a plea of Debt against the Defendant before the Major of London for the said 100 l. and recovered by default, and had Execution of 55 l. 8 s. 5 d. and so acknowledged satisfaction, &c. and did further plead, that the Intestate the 12 Janua. 7 Jacob. did acknowledg in Chancery, that he owed to the Lord Chancellor and to the Master of the Rolls 500 l. which Recovery and Recognizance did amount to 600 l. 8 s. 6 d. Plea.

And that the Defendant for the said Execution, and for payment of divers Debts of the Intestate before this Action, plene administravit omnis bona Intestatoris præterquam bona ad valentiam 100 l. which were liable for the residue of the said Recovery, and for 100 l. parcel of the said 500 l. and that he hath not, nor had, at the day of the Writ, purchased any other goods, &c. saving to the value of the said 55 l. 8 s. 5 d. and the said 100 l. and did aver, that the Debt recovered before the Major, &c. was a true and a just Debt, and that the said Recovery as to 45 l. and 1 d. residue of the said 100 l. 8 s. 6 d. and the said Recovery did remain in force. Obiect.

The Plaintiff as to the Recovery said, That the said Obligation, upon which the said Recovery was had, was made for security of the payment of 55 l. and that the said John Pennial and Elizabeth did accept the said 55 l. 8 s. 5 d. in full satisfaction of the said Judgment, and were content therewith, and offered therefore to make a Release, or to acknowledg satisfaction: but the Defendant, to defraud the Plaintiff of his just Debt, did defer to have satisfaction acknowledged, or to have a Release of the residue of the Judgment, and suffered the Judgment to remain in force by fraud and covin to the intent afore said, &c. Replication.

The Defendant, as to the residue of the Debt, and the acceptance of the said 55 l. 8 s. 5 d. in satisfaction of the Judgment, and to the offer of Release and acknowledgment of satisfaction, did demur in Law. And as to the Recognizance he said, that a Condition was annexed to it, scil. That if the Intestate, his Executors, or Assigns, should pay 100 l. with the increase thereof, to William Francis an Infant, when he shall come to the age of 21 years, and in the mean time shall imploy it to the benefit of the Infant, according to the Will of William Francis, that then the Recognizance shall be void: and did aver, that William Francis was alive, and within age, and that the said 100 l. was not yet payd. Rejoynder.

And the Plaintiff to this did joyn in Demurrer.

And to the other Plea did demur in Law, and the Defendant did joyn.

And I conceive, that as to the first Demur, the Plaintiff ought to have

have Judgment; for now it is acknowledged by the Defendant, that he hath 100 l. in his hands, beſides the 55 l. 8 s. 5 d. delivered in Execution, and he hath not ſhewed any ſufficient cauſe for retaining it; for when thoſe, who recovered 100 l. upon the Bond, did accept 55 l. 8 s. 5 d. in full ſatisfaction of the Judgment, and did offer to releaſe and acknowledge ſatisfaction, this Judgment in truth is diſcharged, and cannot charge the Executor: and therefore he cannot return (riens en ſes maines) to ſatisfie, becauſe he is not bound to pay it. Cook. 8 Rep. Turners Caſe: who brought an Action of Debt upon a Bond of 100 l. againſt Laurence and others, Adminiſtrators of Booker. The Defendants pleaded in Bar divers former Recoveries againſt them in Debt had, that they had not Aſſets, preterquam bona & catalla quæ non attingunt ad valorem, of the ſaid Debts recovered.

The Plaintiff replyed, that the Defendants ſince the Recoveries did pay part of the Debts in full ſatisfaction, wherewith they held themſelves content, and offered to acknowledg ſatisfaction, but the Defendants did refuſe to agree to that, to the defrauding of the Plaintiff. And adjudged that the Plaintiff ſhould recover; for an Executor ought to execute his office truly.

Object. But it may be objected, That there is no place mentioned where the payment or acceptance was?

Anſwer. I anſwer, that it is not material, for it is not iſſuable, but onely evidence to prove the fraud, which is the ſubſtance of the Plea, and that is proved by the ſaid Caſe of Turner. And 42 Ed. 3. 14. Conſpiracy ſhall be brought where it was done, and not where the Inditment was. And 44 Ed. 3. 31. Attachment upon a Prohibition lies where the ſummons is, although the Plea be held in another County. 1 H. 7. 15. B. Payment with Acquittance, pleaded in an Action of Debt upon a Bond, is not double, becauſe that acquittance onely is iſſuable, and the payment is but evidence.

Then the Recognizance is no cauſe of the retaining the 100 l. as in Cook. R. 5. Harriſons Caſe: Green brought an Action of Debt upon a Bond of 40 l. againſt H. Adminiſtrator of Thomas Sydney, the Defendant pleaded that the Inteſtate was bound in a Statute, beſides which he had no goods, &c. The Plaintiff replyed, that there was an Indenture of Defeaſance for performance of Covenants, which hitherto were performed; whereupon the Defendant demurred, and it was adjudged againſt him; for a Debt upon a Bond ſhall be payd before a Statute to perform Covenants, when none of them then were, nor perhaps ever ſhall be broken, but are future and contingent things; and therefore ſuch poſſibilities, which peradventure ſhall never happen, ſhall not bar preſent and due Debts upon a Bond.

And although the Condition of the Recognizance be to pay mony, yet is it to be payd to a ſtranger, and therefore it is not any Debt, but the Debt is onely by the Recognizance.

Alſo it is not to be payd but upon a contingency (to wit) if the Infant comes to full age, but if he dye before, it ſhall never be payd. 36 H. 8. Dyer 59. One deviſed 20 l. to his Daughter to be payd at her marriage, or 21 years of age, and ſhe dyed before marriage, yet it ſhall be payd. 7 Ed. 4. 3. and 18. 36 H. 6. 9. Cook. 9 Rep. fol. 108. In an Action of Debt againſt an Adminiſtratrix who pleaded Statutes, and further that ſhe had not ſufficient, &c. The Plaintiff replyed, that for one of the Statutes a leſſer ſum was accepted in ſatisfaction; and as to the other, that it was for performance of Covenants,

nants, and that none was broken: and the Defendant demurred, and adjudged for the Plaintiff; and that the general averment of payment and acceptance, and that the Statute was for performance of Covenants, was good, becauſe the Plaintiff was a ſtranger thereto.

And this caſe was argued again by me for the Plaintiff, and by Crook for the Defendant, Saturday the 24 of May, Paſch. 15 Jacob. at which day Mountague, Doderidge, and Haughton did agree, that for the firſt matter Judgment ought to be given for the Plaintiff; but as to the laſt Mountague held for the Defendant, but the other two on the contrary. And Doderidge and Haughton agreed that the Plea of the Defendant was naught, becauſe he ſaid, that a Condition was annexed to the Recognizance, and did not ſay, that it was upon condition; and Mountague replyed not. Vide Com. Browning and Beeſtons Caſe, 21 Ed. 4. 49. 28 H. 6. 5.

Hillar. 12 Jacob. Robinſon againſt Greves. Rot. 744.

IN an Action of Treſpaſs, for that the Defendant the 6 of May, 12 Jac. the Houſe and ſeveral Cloſes of the Plaintiff did break and enter, &c. ad damnum, &c.

The Defendant pleaded Not guilty.

The Jury found, that the ſaid Tenements were Copyhold, parcel of the Manor of Eccleſfield, grantable (time out of minde) by the Lord or his Steward by Copy, in Fee, in Tayl, or for life or years, according to the Will of the Lord, and according to the Cuſtom of the Manor: And that before the Treſpaſs Thomas Shercliff was ſeiſed in fee at the will of the Lord, according to the cuſtom, &c.

And that the firſt of January, 14 Elizab. by the hands of Nicolas Shercliff and Thomas Jepſon, two of the Cuſtomary Tenants, Gilbert Earl of Shrewsbury, then and yet being Lord of the ſaid Manor, out of Court, and according to the Cuſtom of the ſaid Manor, did ſurrender to the uſe of Nicolas Stanniland and his Heirs: which Surrender at the next Court, 11 Janua. 40 Elizab. by the hands of the ſaid N. S. and Tho. J. was delivered into the ſaid Court, and there by the homage of the ſaid Court was preſented; and by William Weſt then Steward, was accepted, and entered in the Rolls of the ſaid Court; and that a Copy of the Surrender, under the hand of the ſaid Steward, was delivered to the ſaid Nicolas Stanniland, which Copy was found verbatim: viz. Ad hanc curiam compertum eſt per homagium quod Tho. S. ſurſum reddidit ad uſum N. St. & hæredibus ſuis: but they ſaid, that the ſaid N. St. was no otherwiſe admitted.

By force of which the ſaid Nicolas entered, and the 6 Decemb. 1 Jac. out of Court, by the hands of Thomas Jepſon and Richard Shercliff, did ſurrender according to the cuſtom of the Manor, to the uſe of the ſaid N. St. for life, the remainder to William Stanniland and his Heirs; which Surrender, at the Court of the Manor held the 17 May, 14 Jac. was delivered into Court by the hands of the ſaid Thomas Jepſon and Robert Shercliff, and was preſented by the homage at the ſaid Court, and was there accepted, and entered in the Roll by the Sheriff, and that a Copy of the ſaid Surrender, under the hand of the Steward, was delivered to the ſaid N. St. which Copy was found verbatim in the ſaid words with the former; and found that there was no other admittance.

The ſixth of November, 2 Jacob. Nicolas Sr. dyed.

Thomas Shercliff entered at the Court 6 Maii, 12 Jacob. did ſurrender to the uſe of the Plaintiff for ten years, and payd his Fine, and was admitted, &c. whereby the Plaintiff did enter; upon whom the Defendant by the commandment of William Stanniland did enter, and made the Treſpaſs, &c. And ſo prayed the Opinion of the Court.

And I conceive that the Plaintiff ought to have Judgment.

And in this caſe, are two matters conſiderable: Firſt, if this Preſentment of the Lord, and the entry into the Roll, and the delivery of a Copy entred by the Steward, be any admittance or not.

And I conceive that it is no admittance: For an admittance is a ceremony requiſite to make a Copyhold Eſtate, and is ſo neceſſary, that before admittance, he to whoſe uſe the Surrender is made, hath no Eſtate: as in Bracton 2. cap. 8. Si ipſe ad alium transferre voluerit prius illud reſtituet domino, vel ſervienti, ſi dominus præſens non fuerit, & de manibus illorum fiat tranſlatio ad alium, &c. And before admittance, this is no perfect aſſurance, but onely begins then, as in Peryams Caſe: Cook. 5 R. If the Tenant makes a Feoffment, and is not preſent within the year at the Court, and there enters it, it ſhall be void: Where the Feoffment is but opus inchoatum, as it is there reſolved, and is not perfected until it be preſented and entered. And I conceive that this admittance of a Copyholder is like to a Freehold at Law, in which caſe nothing paſſeth by the Deed till the Livery be made.

And now it is to be conſidered, whether there be any thing here to make the admittance: for firſt, there is no expreſs admittance, but if there be any admittance, it ought to be implied: and I agree that if there be any act to imply the conſent of the Lord to this Surrender, it ſhall be a good admittance: but here is no ſuch thing. For the matter to make an implyed admittance ought to be taken and collected out of theſe four things contained in the Verdict.

1. The preſentment of the Surrender made out of Court, by the homage.
2. The preſentment of the homage: and that is done.
3. The acceptance of the Surrender by the Steward, and the entry thereof in the Roll.
4. The delivery of a Copy by the Steward to Ceſtuy que uſe.

And I conceive that none of theſe do imply an admittance.

For firſt, no act by the homage can make an admittance; for they cannot make an actual admittance, and therefore they cannot by any implyed act make an admittance. Then here is not any act made by the Lord himſelf amounting to an admittance, for there is nothing found to be done by him.

And as to the acts made by the Steward they are three: Firſt, the acceptance of the preſentment which is no admittance, for he being Judg of the Court is bound by the Law to receive the Preſentments offered to him by the homage. Secondly, The Entry in the Roll, and this is alſo his duty to do for the evidence of the Lord, and of him to whoſe uſe the Surrender is made. Thirdly, The delivery of the Copy of the Preſentment, which alſo ought to be done, becauſe that ſerves for Ceſtuy que uſe for his evidence when he was admitted.

But none of theſe things do imply the conſent or will of the Lord, that Ceſtuy que uſe ſhall be admitted, or that he ſhall have the Land according to the Surrender; for when the Law implies any act out of

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the act of the party, the act of the party ought to be such, as does necessarily such a thing to be implyed by the Law, and that to be so necessary, as the act of the party cannot be, unless the Act to be implyed be also done. 14 H. 7. If Tenant for life does surrender to the Grantee of the Reversion, this is first an Attornment implyed by the Law, for otherwise the surrender can take no effect. And 5 Rep. fol. 15. If a Parson makes a Lease for years to the Patron who grants over the Lease, this does imply a confirmation of the Lease, for otherwise the Grant of the Patron shall be avoyded. And so in our Case, if the second Surrender had been made to the Lord in Court, I do agree that it shall be an implyed admittance of Cestuy que use upon the first Surrender. But when the act of the party may be without any such implication, and the matter to be implyed rests indifferent, then it is quite contrary. 2 R. 2. Attornment 8. Feme sole grants a Reversion, to which a Rent is incident, and names the Grantee, to whom the Tenant pays the Rent, this is no Attornment; for it is indifferent whether he pays this to the Grantee as Grantee, or in right of his Wife. Vide 13 Elizab. Dyer 302.

Then in our Case, The acception of the Surrender, the Entry in the Roll, and the delivery of the Copy of the presentment are things indifferent, and are not such acts as necessarily imply any admittance, for all of them may be done, although no admittance be made.

46 Ed. 3. Forfeiture. A Bishop made a Gift of Land in Tayl, rendering Rent, the Dean and Chapter did release part of the Rent, this is a confirmation of the Gift, for it is necessarily implyed, for otherwise the release of the Rent cannot be. But if they had onely entered the Gift of the Bishop in their Register, or in an Instrument under their seal, I conceive this shall be no confirmation; for it may be that they made this, that the successor should be the better able to avoyd it.

And so in the case of the Patron aforesaid, if the Patron had entered the Lease in one of his Evidences, or in an Instrument under his seal, this is not any confirmation, for it may be that he did it for his better remembrance of the Estate granted, and to the intent to instruct the successor to avoyd it.

Secondly, I conceive until the admittance of him to whose use the Surrender is made, the Estate of the Copyholder does remain in Thomas Shercliff who made the Surrender: for it cannot be in Staniland, to whom the Surrender was made, because the Surrender does make no Estate until admittance: for the Heir of the Copyhold hath the Estate of the Copyhold in him before any admittance, because that he hath an Estate descended to him from his Ancestor; for if it were otherwise, the Estate shall be in abeyance, which shall be inconvenient; but Cestuy que use hath nothing until admittance. And in the 5 Rep. Periams Case: A Feoffment by Franktenant of the Manor of Portchester shall be voyd, if it be not presented at the next Court, where it is resolved that the custom is good, and that the Feoffment is not full and perfect until the presentment in Court according to the custom, but it is as opus inchoatum & non perfectum.

And so in our case, the Surrender is no perfect assurance to pass the Estate, until there be an admittance thereupon: and therefore it follows, that until admittance, the Estate doth remain in him who made the Surrender.

And in the Case of Frosell and Walsh, adjudged in this Court the

laſt Term, where Thomas Herring a Copyholder in Fee of the Manor of Manſel-Lacy, the 28 Elizab. according to the cuſtom did ſurrender into the hands of two Tenants out of the Court, to the uſe of George Whittington and others under whom the Defendant claimed, and it was found by the cuſtom that ſuch ſurrender ought to be preſented at the next Court, or that otherwiſe it ſhould be voyd. Thomas Herring dyed, Henry Herring being his Son and Heir, and before any Court holden, or any admittance of George Whittington, Henry Whittington did enter, and made the Leaſe to the Plaintiff, who brought an Ejectment, and it was adjudged for him: for it was reſolved, that until admittance the Eſtate remained in him who made the ſurrender, which by his death deſcended to Henry his Heir.

Hillar. 13 Jacob. Webb againſt Herring.

IN an Ejectment upon a Leaſe made by Henry Perſon the 26 Octob. the 13 of King James, of a houſe in the Parith of St. Mary Abchurch in the Ward of Candlewick-ſtreet: Habendum from Michaelm. laſt paſt for three years, and layd the Ejectment to be the 28 Octob. in the ſame year.

The Defendant pleaded Not guilty.

And the Jury found, that William Say was ſeiſed in Fee of the ſaid Meſſuage, and of two other Meſſuages in the Parith of St. Johns in Walbrook, London, and held them in Socage. And that the 8 Octob. 1562. the ſaid William having iſſue Francis his Son, and Margaret, Agnes, and Alice, by his Will in writing did deviſe the ſaid Meſſuage in theſe words: I bequeath to Francis my Son all my three Houſes, after the death of my Wife Barbara, and his Mother: and if Margaret, Agnes, and Alice, and either of them, do out-live their Mother and their Brother Francis and his Heirs, then they to enjoy the three Houſes for their lives: and the three Houſes then I give freely to my Siſters Sons, John Wittinbury and Roger Wittinbury, and they to pay unto the Wardens of the Bachelors Company of the Merchant-Taylors 6 l. 10 s. yearly to be given to the poor and needy Brethren of the ſame Company for ever: and if the ſaid John and Roger and their Succeſſors do deny the ſaid payment of 6 l. 10 s. it ſhall be lawful that the ſaid Wardens to enter into the three Houſes, and to diſcharge them for ever.

William Say the Deviſor dyes.

Barbara enters.

Francis, Agnes, and Alice dye without iſſue.

Barbara dyes.

Margaret enters.

John Wittinbury dyes without iſſue.

Roger Wittinbury dyes without iſſue, and the Leſſor is Coſin and Heir to him, viz. Son of Margaret Pierſon, Siſter of the ſaid Roger.

The 18 of Auguſt, 13 Jacob. Margaret dyes ſeiſed, having iſſue John Savage her Son and Heir, who entered: which Son, the 17 February, 13 Jacob. did infeoff Edward Jackſon in Fee, who the ſecond of September, 13 Jacob. did infeoff Richard Slydhurſt in Fee, who the third of September, 13 Jacob. did make the Leaſe to the Defendant for four years, who entered, upon whom the Leſſor did enter,

and

and made the Leaſe to the Plaintiff, upon whom the Defendant did enter.

And prayed the Opinion of the Court, &c.

And I conceive Judgment ought to be given for the Defendant.

But firſt, as to the Queſtion that hath been made, ſcil. What Eſtate John and Roger Wittingbury ſhall take (if they ſhall take any Eſtate at all) by this Will: I ſhall not argue: for I agree, that if they have any Eſtate, it is a Fee-ſimple, in reſpect of the continual and perpetual charge impoſed upon them for the payment of 6l. 10s. to the Wardens, &c. for that is to have a perpetual continuance in reſpect of the perſons to whom it is to be payd, ſcil. the Poor. And alſo the perſons to pay are the two Wittingburies and their ſucceſſors, who in the Expoſition of the Will ſhall be taken for their Heirs and Aſſigns: and alſo in reſpect of the limitation of the payment, ſcil. [for ever] which in a Will makes a Fee-ſimple: and ſo as much as the charge is to continue for ever, it follows alſo that the Eſtate ought to continue, for without the Eſtate the charge cannot be.

But I conceive that John and Roger ſhall take nothing by this will, or at leaſt that they ſhall take but a future Eſtate to begin after the death of Francis without Heir, and then their time will never come, for John Savage under whom the Defendant doth derive his Eſtate, is Heire to Francis, and therefore the Plaintiff nor his Leſſor, being Heire to Robert Wittingb. the Survivor cannot have this houſe.

And to prove this, here is an Eſtate limited by expreſſe words to Francis and his Heirs, and no apparent intent by the Deviſor, that the word (Heirs) ſhall be reſtrained to the Heirs of his body, unleſſe by reaſon of the limitation of the Remainders afterwards, which cannot be (as hath been ſaid) if Francis had a Fee-ſimple. But as to this I ſay, that the ſame reaſon may be given, when a man deviſeth Land to A. and his Heires, and if he die without Heire, that it ſhall remain to B. and his Heires, in which caſe if the Deviſe to A. ſhall be reſtrained to an Eſtate in Tatle, the Remainder to be is good, but no ſuch intent can be collected againſt expreſſe words, and therefore the Remainder is utterly void, as in 19 H. 8. 8. B. where the Rule is given, that when the intent of the Teſtator does not agree with the Law, his intent ſhall be void, and this is a certain Rule. And Weſt. 2. cap. 1. where it is provided, Quod voluntas donatoris obſervetur, yet it ought alwaies to agree with the Rules of Law, as is proved by the 8. Aſſiſe 33. where was a Gift in Tatle to two, and if one dies, that the Survivor ſhall have all to him and the heirs of his body, now doth the Law ſay that they have ſeverall Inheritances, but the will of the Donor was, that the Survivor ſhould have all, which being repugnant to the Rule of Law, was adjudged to be a void Clauſe, 35 H. 8. 6. Eſtates 75. Eſtate given to the husband and wife for their lives, the Remainder to the heires of their bodies is an Eſtate-tatle executed, notwithſtanding the expreſſe will of the Donor, becauſe an Eſtate for life and of Inheritance cannot be diſtinct in one and the ſame perſon without a mean Eſtate in another. So that in Wills, if the intent be againſt Law, they are void: And ſo is it if the intent be ambiguous and not manifeſtly to be collected out of the words of the Will. And in our Caſe no manifeſt intent does appear to make the Eſtate of Francis an Eſtate in Tail, Coke 6. Rep. Wildes Caſe; One deviſed land to A. for life, the Remainder to B. in Tatle, the Remainder to R. and his wife, and after their deaths to their Children, who then had two Children, the Deviſor dies, and A. dies, and B. dies without Iſſue, and

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and it was adjudged that the Children of R. and his wife ſhould have only an Eſtate for life, becauſe that by Judgment of Law they have but an Eſtate for life, and if R. and his wife ſhould have an Eſtate in Taile, it ought to be by the intent of the Deviſor, which intent ought to be manifeſt and certain, and ſo expreſſed in the Will, and in this caſe no ſuch intent does appear, for perhaps his intent was to accord with the Rule of Law, 15, & 16 Eliz. 9. a. A. having three Houſes & having three Sons and a Daughter, did deviſe to B. his firſt Son a Houſe, paying ten pounds to his Siſter, and he to enter after the death of the wife of the Deviſor, and did deviſe to his ſecond Son another Houſe, paying to the Daughter ten pounds, and he to enter at the age of one and twenty years, and did deviſe the third Houſe to the third Son paying ten pounds to his Siſter, and he to enter at the age of one and twenty years, and if any of his Sons dies before the age of one and twenty years, his part ſhould be divided amongſt the Survivors; and ſo every one ſhould be heire to the other, and all of them came of age, and paid the money, and it was holden that each of them had an Eſtate in Fee and not in Taile: and Dyer 357. Chick did deviſe the Free-ſimple of a Meſſuage to A. his wife, and after her death to W. his Son, which W. was his Heir apparent. A. did enter and married again, and dyed, having Iſſue by him, and adjudged that A. had an Eſtate for life, the Reverſion to W. for life, the Remainder to A. in Fee: and 14 Eliz. a. One Iſeſed of Lands in Fee deviſed them to B. and the heirs of his body, and if he died, that it ſhould remain to A. in fee, yet B. ſhall have an Eſtate in Taile by the firſt words, and ſhall not be reſtrained by the laſt words. And Trinit. 37 Eliz. Rot. 382. Bacon againſt Hill, and having three Tenements did deviſe them to his wife for life, and then one of them to each of his three Sons, and if any did die, his part ſhould remain to the Survivors, and if any had Iſſue and died before he entred, his Iſſue ſhould have it, and R. one of the Sons had Iſſue, the wife died, and R. died, and adjudged that his Iſſue ſhould have nothing.

Object. But it may be objected that Francis cannot die without heire ſo long as his Siſters are living, and therefore it ſhall be conſtrued that the Deviſor did intend only the heires of his body.

Anſwer. But it does not appear that the Daughters were of the whole blood to Francis, ſo that they may be heires to him; for although where a Brother or Siſter is ſpoken of in pleading, it ſhall be intended of the whole blood, becauſe a Brother of the half blood is but half a Brother, yet here when the Father onely does call them his Sons and Daughters, and is ſo found by the Jury that they were his Sons and Daughters, yet this is no proof that they were of the whole blood, for they are daughters to the Father by what ever wife they were had.

And ſo I conceive upon the whole matter, that the wife does take an Eſtate for life by the deviſe, and that the Son ſhall have a Fee-ſimple, but yet ſubject to this future deviſe, ſc. if he die without heire that the Wittingb. ſhall have it, and ſo all the Will ſhall be good, except the limitation to the Daughters for their lives, and it cannot be intended that the Deviſor did intend to prefer the Wittingb. being his collateral Coſins before the Iſſue of his Daughters which Iſſues are of his owne body.

Judgment. And before that I argued againe, Hillar. 14 Jacob. Judgment was given for the Plaintiff, for they all agreed, that Francis had but an Eſtate-tail by theſe words of the Will, viz. If M. A. and A. do outlive their Mother and their brother Francis and his heires, and Francis cannot

not die without heire, ſo long as his Siſters are living, and therefore the word (Heirs) ſhall not be intended Heires generall, but heires of his body, wherefore Judgment was entred ut ſupra, &c.

Mich. 14 Jac. Maſon againſt Manning.

IN an Ejectment upon a Leaſe made by John Crooker and Chriſtopher Crooker, the two and twentieth of May, 14 Jac. of two houſes, forty acres of Land, forty of Meadow, and forty of Paſture in S. Needs, Habendum from the Annunciation laſt paſt, for three years: The Ejectment was the twenty third of May in the ſame years.

The Defendant as to the force and armes, &c. pleaded not guilty, and as to the reſidue he ſaid, that Queen Elizabeth was ſeiſed in Fee of the Manor of S. Needs, whereof the ſaid Tenements are, and time out of mind were parcell, and that the Queen the ninth of March, in the one and thirtieth year of her Raign, by her Letters Patents, ſhewed here under the Exchequer Seal, did deviſe the ſaid Tenements to Robert Croker for life, the Remainder to Edward Bet for life, the Remainder to Edward Adams for life, the Queen dies, whereby the Reverſion does deſcend to the King, Robert Croker dies, and the thirtieth of March, 14 Jacob. Edward Bet doth deviſe the ſaid Tenements to the Defendant from the Annunciation laſt paſt, for three years, whereby he entred and was poſſeſſed, untill the ſaid John and Chriſtopher Croker did put him, and did diſſeiſe the ſaid Edward Bet, whereby they were ſeiſed in fee by diſſeiſin, and made the Leaſe to the Plaintiff, upon which the Defendant claiming his term, did enter, and did out him, and the Defendant was and yet is poſſeſſed of the ſaid Tenements, the Reverſion to Edward Bet for life, the remainder to Edward Adams for life, the Reverſion to the King: unde non intendit quod curia (domino Rege inconſulto) ulterius procedere vellet aut debeat; and prayed ayd of the King, and did aver the life of Edward Bet.

And I conceive that ayd is not grantable in this caſe.

1. Becauſe that it is but an Action of Treſpaſs: 4 H. 6. 10. Tenant for life of a Leaſe from the King ſhall not have ayd of the King, for that no Freehold is to be recovered, and he is able to plead to all matters in a Treſpaſs.

2. The Defendant ſhall not have ayd of the King, becauſe he is not his immediate Tenant, but he may pray in ayd of Edward Bet his Leſſor, and he of the King. 1 H. 4. 18. In a Scire facias to execute a Fine, the Tenant ſaid, that the Land was given to him for life, the remainder to N. in Tail, the remainder to W. in fee, who was attaint of Treaſon, whereby his remainder came to the King, and he prayed ayd, &c. And the Court ſaid, that he ought to pray ayd of N. and he of the King: and after he ſaid that W. was alſo attaint of Treaſon, whereby he had ayd of the King. 33 H. 6. 29. In a Treſpaſs, where the Defendant juſtified as Baily of a Hundred to diſtrain for amercements, and prayed ayd of the King, and by Priſot, he could not have it, for the Sheriff is the immediate Officer to the King: and to this agrees 11 H. 6. 39. where ſuch juſtification was for taking of Toll: and 9 H. 6. 26. In a Replevin, the Defendant made Conuſance as Baily of I. who held of the King for life, and prayed ayd of the King, and adjudged he ſhould not have it, for there is no privity betwixt the King and him, becauſe he is not immediate: and 28 H. 6. 13. A man

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ſhall not have ayd of the King and Queen, or of the King and his Tenant for life, but firſt of the Queen or Tenant for life, and they of the King; and a man ſhall not have ayd of the King, but where he is Baily or Servant immediately to the King.

Judgment. And for theſe Reaſons the Defendant was outed of his ayd by Judgment of the Court.

Michaelm. 14 Jacob. Lightfoot againſt Lerret and others.

IN an Action of Treſpaſs, for that the Defendants, 20 Novemb. 13 Jacob. two Heifers of the Plaintiff of price 6 l. at Bentley and Sprodburgh, did take, chaſe, and drive away, &c.

Richard Lerret did plead not guilty, and the other Defendants, viz. William Lerret and Edward Taylor, as to one of the Steers did plead Not guilty, and for the other, that the King was ſeiſed in Fee of the Mannors of Doncaſter, Arkſe, and Sprodburgh, whereof the Bridges called Wilcomb-Bridg and St. Mary-Bridg, are, and time out of mind, &c. were within the ſaid Mannors.

That the 14 of January, 13 Jacob. the King did grant to Edmund Duffield and John Babington, and their Heirs, Tolnetum omnium & ſingulorum pecudum, that did paſs and repaſs upon the Water and River of Dun in the County aforeſaid, at and by the ſaid Bridges, to have and receive for the ſame, as there the Kings of this Realm were uſed for ſuch Toll or paſſage, rendering 10 s. Rent to the King. And they ſaid, that before and at the time of the making of the Grant, the Toll was uſed to be taken at a Brig called Burrow-Bridg, in the County aforeſaid, for every twenty Cattel that paſt by that Brig 6 d.

That the 28 Junii, 13 Jacob. Duffield and Babington by Deed enrolled, and for a ſum of money, did bargain and ſell the ſaid Toll to John Richardſon and his Heirs.

That the third of June in the ſaid year, John Richardſon did bargain and ſell the Toll to the ſaid William Lerret and his Heirs.

And the Plaintiff before the Treſpaſs was poſſeſt as well of the ſaid Steer as of thirty nine others, and that the ſaid Plaintiff at the time aforeſaid did drive the ſaid Cattel by the ſaid Willow-Bridg and St. Mary-Bridg, whereupon the ſaid William Lerret did demand of the Plaintiff 12 d. for Toll of the ſaid fourty Cattel, which the Plaintiff did refuſe; whereupon the ſaid William in his own right, and the other as his ſervant, did take the ſaid Steer by diſtreſs for the ſaid 12 d. And prayed ayd of the King, &c.

The Plaintiff replyed, that the ſaid Willow-Bridg and St. Mary-Bridg were common Bridges for paſſage for all the Kings Subjects of the City of York, and other Cities and Towns in the North parts to Doncaſter, and from thence to London, and to the Cities and Towns in the South parts, at their pleaſure with Carts, &c. and that neither at the making of the Letters Patents, nor at any time before, any Toll was taken or received for any paſſages over the Bridges aforeſaid.

Whereupon the Defendants demurred in Law, and the Plaintiffs joyned.

And I conceive that Judgment ought to be given for the Plaintiff.

1. The Grant is of Toll for Cattel paſſing and repaſſing upon the River of Dun by the ſaid Bridges, and it is not alledged that the Cattel did paſs over the ſaid River. It

It is alledged that the two hedges are within the Manno2, but it is not alledged that they are parcel of the Manno2; ſo that it may be upon the Land of a Freeholder, and if ſo, the King cannot grant the Toll. 2.

No certainty is granted, but onely to take and receive, &c. and it is not alledged that at any Bridges any Toll was taken but onely at Burrowbridg. 3.

No Town is alledged in which Burrow-Bridg is. 4.

And Paſch. 15 Jacob. It was agreed by all the Court, that the Grant was utterly voyd for the uncertainty, viz. to take ſuch toll as was taken there and otherwhere within the Realm of England, &c. And alſo that the Plea of the Defendant was utterly inſufficient for the other cauſes aforeſaid: wherefore it was adjudged that the Defendants ſhould be outed of their ayd, and that they ſhould plead in chief, &c.

Paſch. 14 Jacob. Parker againſt Sanders.

IN an Information upon the Statute of 39 Eliz. cap. the 2d. as well for the King as for himſelf, for that one hundred acres of Land in Nether-Winchenden in the County of Bucks, 17 Novemb. 1 Eliz. and before the 24 of Octob. 29 Eliz. were converted from tillage to ſheep-paſture, and graſing of Cattel, which 100 acres were arable Land, ſuch as were uſed in tillage for twelve years together next before the ſaid converſion, according to the nature of the ſoyl and courſe of tillage in that part of the Country: and that the ſaid 100 acres were not reſtored to tillage, nor layd for tillage before the firſt of May, 1599. nor ever ſince: And that the Defendant the 26 of March, the 13 of King James, was occupier of the ſaid hundred acres, and did ſo continue until the 27 Martii, 14 Jacob. and that the Defendant the 27 of March did not reſtore nor lay to tillage the ſaid hundred acres, but for the ſaid time converted them into paſture, contrary to the form of the Statute, &c.

The Defendant pleaded Not guilty.

And the Jury for the fifty acres of Land did finde the converſion after the 17 of November, 1 Elizab. and before the 24 of October, the 39 of Elizabeth, and that they were uſed in tillage for twelve years together before the ſaid converſion, and that they were not reſtored to tillage before the firſt of May, 1599. nor ever ſince; and that the Defendant the 26 Martii, 13 Jacob. was occupier of the ſaid fifty acres from that time unto the 27 Martii, 14 Jacob. continuing his occupation thereof, and was not occupier thereof before the 26 Martii, 13 of King James: And that the Defendant, nor any other, before the 27 Martii, 14 Jacob. reſtored or layd the ſaid fifty acres to tillage, but continued them in Paſture during the ſaid time: And prayed the advice of the Court.

And I conceive that Judgment ought to be given for the King and the Informer for 50 l. (viz.) twenty ſhillings for every one of the ſaid fifty acres.

And to this purpoſe the Statute hath two clauſes, the firſt is a commandment, and this doth conſiſt of two parts: 1. That all Land converted from tillage to paſture ſince the 7 of Novemb. and before the 24 of Octob. 39 Eliz. being before uſed in tillage for twelve years together, ſhall be reſtored to tillage before 1599. ſo as the whole accord-

ing to the nature of that ſoyl, and courſe of husbandry uſed within that part of the Country, be within three years at the leaſt turned to tillage by the occupiers and poſſeſſors thereof. 2. And ſo ſhall be continued for ever.

The ſecond clauſe doth contain the forfeiture, (viz.) That if any ſhall offend againſt the premiſſes, every ſuch perſon ſhall forfeit for every acre not reſtored, or not continued as is aforeſaid, 20 s. for every year that he ſo offends.

Judgment. And Judgment was given for the King and the Informer, for otherwiſe the Statute ſhall be utterly defeated: for if no information be for the converſion within one year after, or if the Converter pay the penalty of 20 s. for the converting, he may let it out to another: And by preſence of the Defendants Counſel, he ſhall not be ſubject to penalty for the continuance: But the Court agreed, that he who made the converſion ſhould be puniſhed, and ſo ſhould every other occupyer of the Land who does not keep the Land in tillage.

Rot. 386. ## Michaelm. 12 Jacob. Perryn againſt Audrey Barry.

IN a Writ of Error to reverſe a Judgment given in the Kings Bench for the ſaid Audrey againſt the ſaid Perryn, in Debt upon a Bond of 100 l. made the 28 of April, 5 Jacob. In which Action the ſaid Perryn demanded Oyer of the ſaid Bond, and of the Condition, which was, That if the Defendant John Perryn, his Executors and Adminiſtrators, ſhould perform the Award of Thomas Clyff, Roger Glover, Robert Goodwin, and Thomas Piborn, Arbitrators as well for the ſaid Perryn as the ſaid Audrey Barry, elected to Arbitrate of, for, and upon all and all manner of Actions, cauſe and cauſes of Actions, Suits, Treſpaſſes, Debts, Duties, &c. and all other demands whatſoever, which between the ſaid parties at any time, until the date of the Obligation, have been had, moved, or now depending: ſo that the ſame Award, &c. of the ſaid Arbitrators, or any three of them, of the premiſſes, be made and given up in writing, indented under their hands and ſeals, on or before the laſt of May next, that then the Obligation ſhall be voyd. And the Defendant did plead, that the ſaid Arbitrators did not make any Award.

The Plaintiff did reply, that the ſaid Roger Glover, Robert Goodwin, and Thomas Piborn, three of the ſaid Arbitrators, the 30 of May, fifth of King James, did make their Award by writing indented, That the Defendant ſhould pay to the Plaintiff 57 l. (viz.) upon or before the 16 of June next 10 l. and the 29 of September next 17 l. and the 25 of Novemb. next 20 l. and the 25 of March next 10 l. And whereas the Defendant and Stephen Perryn were bound to the Plaintiff in 12 l. upon condition to pay 6 l. at certain days, that the ſaid Obligation ſhould be to the Plaintiff in force as then it was, and that ſhe ſhould have ſuch benefit thereby as ſhe might have had before, and that the Plaintiff ſhould acquit and ſave indemnified the Defendant from all Debts, Duties, and mony, for which the Defendant with the Plaintiff was indebted or bound to Dingley, Numan, Clark, Cater, or any of them. And that all Actions depending between the parties in any of the Kings Courts, and all other Actions and cauſes of Action for any matter between them, except the matters contained in the Arbitrement, and the Obligation to perform the Award, ſhould ceaſe, &c. And that if any controverſie or doubt ſhould happen between the parties, for or about any word, ſentence, or thing in the Arbitrement, or of or touching the Award, or any thing contained therein, that the parties

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and their Executors ſhall perform ſuch explanation and conſtruction thereof, as the ſaid three Arbitrators ſhould make in writing under their hands concerning the ſame. And that the Plaintiff ſhall pay to George Write for drawing and ingroſſing the ſaid Arbitrement 6 s. 8 d. which Agreement the ſaid three Arbitrators ſhall deliver to the parties the ſame day.

And although the Plaintiff did perform all, yet the Defendant did not pay the 10 l. the 16 of June next.

And hereupon the Defendant demurred in Law, and the Plaintiff joyned, and Judgment given for the Plaintiff: whereupon the Defendant brought this Writ of Error.

And aſſigned the firſt Error, becauſe the ſubmiſſion was to four, and the Arbitrement was by three onely. 1 Error.

But all the Juſtices and Barons did hold, that the Agreement was well made notwithſtanding; for it ſhall be taken now to be a ſubmiſſion to four, or any three of them: and ſo was it agreed in the Kings Bench, where this point hath been argued at the Bar oftentimes.

The ſecond was, that the Arbitrators did not make any Award for the Bond of 12 l. in which the ſaid Plaintiff and St. Perryn were bound to the now Defendant, upon condition to pay 6 l. at certain days: and the ſubmiſſion is conditional, ſc. That the Award be made of all things, &c. and therefore they ought to have determined theſe matters. For it may be that this was the principal cauſe why the Plaintiff did ſubmit himſelf to the Award, ſc. to be diſcharged of this Bond, which perhaps was forfeited for not performing the condition, with the penalty whereof he ſhall be now charged. And although the Bond was made by the Plaintiff and another, yet was it a cauſe of action depending between the Plaintiff and Defendant, for the may ſue him. 2 R. 3. 18. b. If three men and another do refer themſelves to an Arbitrement of all demands between them, the Arbitrators may make an Award of all matters which the three had againſt the other joyntly, and of each matter which every one of the three hath againſt the fourth, and may award that every one of the three ſhall pay mony to the fourth. Vide Comment. 389. Chapmans Caſe. 2 Error.

21 H. 7. 296. In debt by a woman as Executrix, the Defendant ſaid, that I. S. her husband and the Defendant did refer themſelves to Arbitrament, who made an agreement, and the husband dyed, and the Court held, that the debt of the woman as Executrix was extinct by this Arbitrement.

The clauſe, that the now Defendant ſhould acquit the Plaintiff of all Debts wherein he was bound with the Defendant to Dingley, &c. is inſufficient, becauſe there is no Chriſtian name. 3.

The breach is aſſigned, for that the Defendant did not pay the 10 l. upon the ſixth day of June, whereas the Award was, that it ſhould be payd upon or before the 16 day of June. But all did agree, that this was well aſſigned, becauſe that when it is alledged, that it was not payd upon the 16 day, it was not payd before the day. 4.

The Arbitrators have awarded, that the parties ſhall ſtand to their Award for conſtruction of the Arbitrement, and of all things in the Award, and of all matters concerning them for the future, which is not in their power, for all the Award ought to be made before the laſt of May. 5.

They award 6 s. 8 d. to be payd by Audrey to George Write, for ingroſſing of the Award, which is not within the ſubmiſſion: 1. Becauſe Write is a ſtranger: 2. Becauſe it is a thing agreed on after the ſubmiſſion. 6.

ing to the nature of that ſoyl, and courſe of husbandry uſed within that part of the Country, be within three years at the leaſt turned to tillage by the occupiers and poſſeſſors thereof. 2. And ſhall be continued for ever.

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Judgment. And Judgment was given for the King and the Informer, for otherwiſe the Statute ſhall be utterly defrauded: for if no information be for the converſion within one year after, or if the Converter pay the penalty of 20 s. for the converting, he may let it out to another: And by preſence of the Defendants Counſel, he ſhall not be ſubject to penalty for the continuance: But the Court agreed, that he who made the converſion ſhould be puniſhed, and ſo ſhould every other occupyer of the Land who does not keep the Land in tillage.

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The Plaintiff did reply, that the ſaid Roger Glover, Robert Goodwin, and Thomas Piborn, three of the ſaid Arbitrators, the 30 of May, fifth of King James, did make their Award by writing indented, That the Defendant ſhould pay to the Plaintiff 57 l. (viz.) upon or before the 16 of June next 10 l. and the 29 of September next 17 l. and the 25 of Novemb. next 20 l. and the 25 of March next 10 l. And whereas the Defendant and Stephen Perryn were bound to the Plaintiff in 12 l. upon condition to pay 6 l. at certain days, that the ſaid Obligation ſhould be to the Plaintiff in force as then it was, and that ſhe ſhould have ſuch benefit thereby as ſhe might have had before, and that the Plaintiff ſhould acquit and ſave indemnified the Defendant from all Debts, Duties, and mony, for which the Defendant with the Plaintiff was indebted or bound to Dingley, Numan, Clark, Cater, or any of them. And that all Actions depending between the parties in any of the Kings Courts, and all other Actions and cauſes of Action for any matter between them, except the matters contained in the Arbitrement, and the Obligation to perform the Award, ſhould ceaſe, &c. And that if any controverſie or doubt ſhould happen between the parties, for or about any word, ſentence, or thing in the Arbitrement, or of or touching the Award, or any thing contained therein, that the parties

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and their Executors ſhall perform ſuch explanation and conſtruction thereof, as the ſaid three Arbitrators ſhould make in writing under their hands concerning the ſame. And that the Plaintiff ſhall pay to George Write for drawing and ingroſſing the ſaid Arbitrement 6 s. 8 d. which Agreement the ſaid three Arbitrators ſhall deliver to the parties the ſame day.

And although the Plaintiff did perform all, yet the Defendant did not pay the 10 l. the 16 of June next.

And hereupon the Defendant demurred in Law, and the Plaintiff joyned, and Judgment given for the Plaintiff: whereupon the Defendant brought this Writ of Error.

And aſſigned the firſt Error, becauſe the ſubmiſſion was to four, and the Arbitrement was by three onely. 1 Error.

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The breach is aſſigned, for that the Defendant did not pay the 10 l. upon the firſt day of June, whereas the Award was, that it ſhould be payd upon or before the 16 day of June. But all did agree, that this was well aſſigned, becauſe that when it is alledged, that it was not payd upon the 16 day, it was not payd before the day. 4.

The Arbitrators have awarded, that the parties ſhall ſtand to their Award for conſtruction of the Arbitrement, and of all things in the Award, and of all matters concerning them for the future, which is not in their power, for all the Award ought to be made before the laſt of May. 5.

They award 6 s. 8 d. to be payd by Audrey to George Write, for ingroſſing of the Award, which is not within the ſubmiſſion: 1. Becauſe Write is a ſtranger: 2. Becauſe it is a thing agreed on after the ſubmiſſion. 6.

Judgment. And Hill. 14 Jac. The Judgment was affirmed, and they agreed the laſt agreement to be void, but that was not materiall, for the Award was void only for that, and good for the reſidue.

Rot. 100. ## Hillar. 13 Jacob. Mande againſt French.

IN an Action of Debt for forty pounds upon the Statute of 2 Edw. 6. For that the Plaintiff is and was for two years paſt Rector of Biſeild, and the Defendant the firſt of October, 12 Jacob. was Occupier of eighteen acres of Land, and thirty of Paſture in Biſeild aforeſaid, and did continue the occupation thereof for a yeare after, and the firſt of Septemb. the 13 Jacob. did mow and reap the Hay growing upon the Meadow, and the Grain (viz.) Barley, Wheat, Peaſe, Beans, and Oates growing upon the Land, and the ſame day did take and carry them away without ſetting out the Tithes, or agreeing with the Plaintiff for them, and did aver the value of the Tithes to be thirteen pounds, ſix ſhillings, eight pence.

The Defendant pleaded Non debet.

The Jury found that King Henry the eighth, was ſeiſed in Fee of the Advowſon of Biſeild, and the five and twentieth of April, 34 H. 8. the King granted the ſame to Sir Edward Knightly, and Urſula his wife, and to the Heirs Males of the body of Sir Edmund, the remainder to Valentine Knightley his brother, and the heires males of his body, the Remainder to the right heires of Sir Richard Knightley then dead, Father of the ſaid Sir Edmund.

Sir Edmund died ſeiſed without Iſſue,

Urſula did ſurrender to Valentine, and the fifth of September 4, & 5 Phil. & Mar. Valentine did give and grant the Advowſon to Sir John Spencer, and others, and their heires, to the uſe of himſelf for the life of Urſula, and after the deceaſe of which of them ſhould firſt die, to the uſe of Richard Knightley his Son, and Mary his wife, and the heires males of the body of Richard, the Remainder to the right heires of Sir Richard Father of Valentine.

That the twentieth of Febr. 6 Eliz. William Briggs Rector of Biſeild, by Indenture did let the Rectory to the ſaid Richard Knightley, habendum from the next Annunciation for ſixty one yeares, rendring 28. pounds Rent. And that the twenty fourth of Febr. 6 Eliz. Valentine Knightley did confirm the Leaſe: and the laſt day of February in the ſame year, the Biſhop of Peterborow being ordinary did confirm it.

That the thirtieth of July, in the ſame year, Richard Knightley did grant the Leaſe to Edward Knightley his ſecond Son, and afterwards recovered the profits, to the uſe of Edward being within age.

That the eighth of May, 8 Eliz. Valentine died ſeiſed of the Advowſon, having Iſſue the ſaid Richard his eldeſt Son.

William Briggs did recover the Rent during his life and dies, whereby Richard Knightley does preſent William Reynolds who was admitted, inſtituted, and inducted, Reynolds did reſigne, whereupon Richard Knightley did preſent Richard Burdſale, who was admitted, &c. and Burdſale did reſigne, wherefore Richard Knightley did preſent Simon Rogers who was admitted, &c.

And they found that all theſe perſons did accept the Rent.

And that the firſt of Septemb. 21 Eliz. Richard Knightley did take the profits to the uſe of Edward, and did deviſe the Rectory to Rogers the Parſon

Parſon for forty years, if he ſhould be ſo long Parſon there.

That the thirteenth of Novemb. 27 Eliz. Sir Richard Knightley did grant the Advowſon to Valentine his Son in Fee.

That the 34 of Eliz. A Fine was levied between Bartholomew Tate and Henry Yelverton Eſquires, Plaintiffs, and Valentine Knightley Eſquire, Defoxeator of the ſaid Advowſon, Sur conuſans de droit come ceo, with Warranty to the uſe of the Conuſees and their heirs.

Rogers did reſigne, whereupon the ſaid Valentine did preſent Jonas Challoner, who afterwards died, and the Ordinary did preſent the Plaintiff by Laps, who did accept the Rent for divers years.

And they found the carrying away of the Tithes, and to the value of ten pounds.

And prayed the opinion of the Court upon the whole matter, whether the Defendant owed the thirty pound to the Plaintiff, or not.

Upon which Verdict, the caſe is this.

Valentine Knightley ſeiſed of an Advowſon in Taile to him and the Heirs males of his body, the Remainder to the right Heirs of Sir Richard Knightley his Father then dead, the 4, & 5 of Philip and Mary, did give and grant the Advowſon in Fee to the uſe of himſelf for the life of Urſula Knightley, the Remainder to Richard his Son and Mary his wife, and the heirs males of the body of Richard, the Remainder to the right heirs of the ſaid Sir Richard the Father. The twentieth of February, 6 Eliz. William Briggs the Incumbent does make a Leaſe of the Rectory by Indenture, to Richard the Son for ſixty one years, from the Annunciation next, &c. rendring twenty eight pounds Rent.

And the twenty fourth of Febr. 6 Eliz. Valentine Knightley does confirm the Leaſe; and the laſt of February in the ſame year, the Ordinary confirms it.

The thirtieth of July in the ſame year, Richard the Leſſee grants the Term to Edward Knightley his ſecond Son within age, and takes the profits to his uſe. And the 8. of Eliz. Valentine dies, Richard being his eldeſt Son: William Briggs dies, whereby Sir Richard does preſent William Reynolds who was admitted, &c. And he did reſigne, whereby Sir Richard did preſent Burdſale, &c. who did reſigne, &c. whereby he preſented Rogers, and all theſe perſons did receive the Rent. And the 21 Eliz. Sir Richard did make a Leaſe of the Rectory to Rogers the Parſon for forty yeares, if he ſhall be there Parſon ſo long. 27 Eliz. Sir Richard grants the Advowſon to Valentine his Son in fee: and 34 Eliz. A Fine was levied of the Advowſon between Bartholomew Tate, and Henry Yelverton Plaintiffs, and Valentine Knightley Defoxeator, to the uſe of the Conuſees and their heirs; Rogers did reſigne, whereby the ſaid Valentine did preſent John Challoner, &c. who died, and the Ordinary collated the Plaintiff by Laps, who for many years accepted the Rent, and the Defendant did take and carry the Tithes to the value of ten pounds.

And whether this Leaſe be good to bind the Plaintiff, or not, is the queſtion, and I conceive it is not.

And for the arguing of this Caſe I will conſider theſe three things.

I. The Validity of the Leaſe without any confirmation.

II. If here be any confirmation of this Leaſe, and if it continues in force againſt the now Plaintiff.

III. Admitting here be not any ſufficient confirmation of it ſelf, if the Fine levied by Valentine Knightley hath given any force and ſtrength to it.

And

And as to the firſt I conceive without any doubt that this Leaſe without any confirmation is determined by the death of the perſon who made it, and is ſo determined as no acceptance of Rent by the Succeſſor can make it good, and therefore the difference is between a Leaſe for life, and a Leaſe for years made by a perſon rendring Rent, for the Leaſe for life is only voidable, and not void by the death of the Leſſor, ſo that if the Succeſſor does accept the Rent and Fealty, he ſhall be bound for his time, as in 11 Ed. 3. and 8 H. 5. 10. and 2 H. 4. 2. The Succeſſor ſhall maintain an Action of Waſte againſt ſuch Leſſee for life, but a Leaſe for years is meerly determined by the death of the Leſſor, 38 H. 8. 6. Leaſes 18. and 24 H. 8. 6. There a diverſity is taken and agreed between a Leaſe for life made by a Parſon in which caſe the acceptance of the Rent or fealty by the Succeſſor ſhall make it good, for his time, and a Leaſe for years which is meerly determined by the death of the Leſſor, ſo that no acceptance of the Rent or fealty can make it good, and therefore the acceptance of the Rent in our caſe, which is found to be made by the Leſſor himſelf, and all the ſucceeding perſons, and alſo by the Rule of theſe Books, is nothing to the purpoſe, and therefore I ſhall ſpeak no more of that, Vide 2 Ed. 6. 33. Dyer 239.

2. And as to the ſecond Point, ſc. If here be any ſufficient confirmation of the Leaſe againſt the Plaintiff, or not; The Defendant hath endeavoured to have many things to be found by the Jury to make a confirmation. 1. The expreſſe confirmation by Valentine Knightley the Father of Sir Richard. 2. The Grant of the Leaſe by Sir Richard to Edward Knightley his Son. 3. The taking of the Profits by Sir Richard, to the uſe of his Son being within age. 4. The Leaſe made by Sir Richard, the 21. of Eliz. to Rogers the Incumbent: for I cannot conceive for what cauſe any of theſe things are found, unleſſe it be to opperate as to a confirmation.

And as to the firſt, third, and fourth, I do conceive, that they nor none of them can make this Leaſe good, for by the firſt it is found that Valentine at the making of his confirmation had but an Eſtate for life of Urſula Knightley, the which is meerly determined by the death of Valentine, and although Urſula be not found dead, yet is not that materiall, for this Advowſon being a thing that lies only in Grant and not in Law, cannot go to any Occupant. And therefore the death of Valentine hath determined this as fully, as if Urſula had been dead. And therefore the diverſity is when a rent or other thing which lies in grant is granted to one and his heirs for the life of another, and the Grantee dies; I agree that the heir by ſpeciall limitation ſhall have this: as Littleton 169. 19 Ed. 3. Account 56. but no Eſtranger can have it, and the reaſon is, becauſe that the ſole means that the Law doth give to one to gain an Eſtate of Occupancy is by Entry, but no Entry can be in an Advowſon, Rent or any other thing that lies in Grant, and therefore here can be no Occupancy, 26. Aſſiſe 38. and 12 H. 7. 16. If he in Reverſion doth enter after the Occupant, and brings an Action againſt him, the Occupant ought to plead the Leaſe for Ceſtuy que uſe, whoſe Eſtate he hath, but for a Rent or an Eſtate that lies in Grant, none can plead a que Eſtate, but ought to entitle himſelf by the Grant, and that cannot any one do in this Caſe. And as to the third matter of confirmation, which is the taking of the Profits by Sir Richard Knightley, this cannot be any confirmation of the Leaſe, for although the aſſent of the Patron be ſufficient, yet it ought to be by Deed, otherwiſe it cannot be good. And as to the fourth, which is the Leaſe made by

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Sir Richard by Rogers the Incumbent, that is not any confirmation. 1. Becauſe this Leaſe does not concern the Leaſe made by Briggs, but is an abſolute and originall Leaſe made by Sir Richard himſelf as Owner of the Rectory. 2. Becauſe that at the making of this, Sir Richard had nothing in the Rectory, for he had granted all his term before to Edward Knightley, and therefore his Leaſe to Rogers is void, unleſſe it be by way of Eſtoppell.

Then as to the ſecond matter of confirmation, ſc. whether the Grant of the Term by Sir Richard to Edward Knightley, I will not agree to it at all, but according to the reſolution in Hodges caſe, that this is a confirmation as good as Sir Richard could make it. But this confirmation being in the nature of a charge upon the Advowſon, ought to be directed by the Eſtate which Sir Richard then had, and being derived out of that Eſtate, it cannot endure longer then the Eſtate, as in Littleton 122.a. If a Parſon doth charge the Glebe, and the Patron and Ordinary confirm it, the Grant ſhall be in force, but in ſuch caſe the Patron ought to have an Eſtate in fee, for if he hath an Eſtate but for life or in Taile, the Grant is good but during his life, and the life of the Parſon who grants it, 31 Ed. 3. Grants 61. A Parſon grants an Annuity to a Pryor which is confirmed by the Tenant in Dower of the Advowſon. this is not good after the death of the Tenant in Dower, and Dyer 252. A Chantry Prieſt made a Leaſe for ninety nine years, which was confirmed by the Patron who was Tenant in Taile, and after the Chantry is diſſolved by the 1. of Ed.6. it is a queſtion if the King ſhall avoid the Leaſe, but it was agreed clearly, that if the Chantry had continued, that the Leaſe ſhould be void againſt the Incumbent, who comes in upon the preſentation of the Tenant in Taile.

And this Rule being clear (as I conceive it is) that the confirmation ſhall not bind according to the Eſtate of the Patron, the Eſtate which Sir Richard had in the Advowſon at the time of his aſſignment, which does imply a confirmation is to be conſidered.

And as to that, the Caſe is, That Valentine being Tenant in Tail of the Advowſon, by Deed did give and grant the Advowſon to one in fee to the uſe of himſelf, during the life of Urſula, the Remainder to the uſe of Sir Richard, being his Iſſue in Taile, and thereupon it follows that Sir Richard had an Advowſon in Remainder in Fee-taile, depending on an Eſtate for anothers life, but this fee was determinable upon the death of Valentine the Tenant in Taile.

But objection was made in the Argument againſt one, that this Advowſon being found to be granted by Valentine, ſhall be intended to paſſe by Livery (for it was ſaid that an Advowſon might paſſe by Livery) and then here is a diſcontinuance. Object.

But I deny firſt that an Advowſon can paſſe by Livery, but admitting it would, yet ſecondly, Shall it not be taken by this Verdict to paſſe ſo. And as to the firſt, I muſt confeſſe that there are ſome ſuddain opinions in your Book, that an Advowſon may paſſe by Livery, as 43 Ed. 3. 5. 11 H. 6.4. and 20 Ed. 4.& 5. yet are there many Authorities againſt it, and ſo is the true reaſon of the Law. 18 Ed.3.16. Shard, It was never heard that one could enter into an Advowſon, therefore no Livery can be made; and 11 H.4.3.6. An Advowſon in groſſe cannot paſſe without Deed, 9 Ed.4.47.a. One cannot grant Proximam advocationem without Deed, Dyer 323. Advowſon of the Vicaridge of D. doth paſſe by the Grant of all hereditaments in D. although it lies not in Livery, nor is viſible, and Coke 9.Rep. 96. An Advowſon Anſwer.

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is not manuall, but is Hæreditas incorporata; and ſo Littleton 3. of things which do not lye in manuall occupation or poſſeſſion, as an Advowſon, he ſhall not plead as ſeiſed in his Demeſne as of fee, but as of fee: and ſo Littleton 139. If Tenant in Taile grants the Advowſon it is no diſcontinuance.

And the reaſon is apparent, becauſe that nothing can paſſe by Livery, but that whereof poſſeſſion may be taken by the Feoffor or Donor, and given to him by the Feoffee or Donee. And it is more colourable to ſay that he in Reverſion upon an Eſtate for life may make Livery, for although a Reverſion be not viſible or manuall, yet Terra revertens which the Grantee ſhall have after the Eſtate determined is manuall, and yet I conceive that none will hold that ſuch a Reverſion ſo long as it continues a Reverſion may paſſe by Livery.

2. If it be admitted that an Advowſon may paſſe by Livery, yet it ſhall be intended by this Verdict that it doth not paſſe, becauſe it is found that Valentine did grant it by Deed, and there is no doubt but it may paſſe by Deed without Livery, and therefore no Livery being found, Livery ſhall not be intended, for it ſhall not be intended to be a diſcontinuance whereby the Tenant in Taile ſhall do wrong, when the Advowſon may well paſſe by Deed which is no wrong. And therefore I conceive, that notwithſtanding this objection that here is no diſcontinuance but only a grant of an Advowſon, which is determinable by the death of the Tenant in Taile who made it, from whence it follows, that Sir Richard at the time of his grant of the Leaſe, had only a Remainder in fee in the Advowſon determinable on the death of Valentine his Father, which Eſtate is only charged by his confirmation, for as Iſſue in Taile he cannot make any confirmation, becauſe he had nothing in him at that time, 10 Ed. 3. 2. Confirmation 22. If the Son confirmes the Eſtate of the Diſſeiſor in the life of his Father, and the Father dies, the Son ſhall not be barred by his confirmation without Warranty.

13 Ed. 1. Confirmation 19. If one doth quit Claime for him and his heirs, all his Right before that his Right doth happen, the quite claim is nothing, and ſo is Littleton 106. Releaſes, and the reaſon of theſe Caſes is upon the Rule of the Common Law, which is, that one cannot grant or charge that which one hath not.

By which it plainly appears that this implyed Confirmation made by Sir Richard, does make the Leaſe good only for ſo long time, as he hath Eſtate in the Advowſon, which is determinable by the death of Valentine. And to prove that it is ſo determinable, it is a certain Rule, that all Grants and Charges made by Tenant in taile are determined with his life: and ſo is Littleton, Diſcontinuance 139. If Tenant in taile of an Advowſon or Common does grant this in fee, it is no Diſcontinuance, for the Grantee hath no Eſtate but for life of the Tenant in taile who made the Grant; 22 H. 3. Diſcontinuance 52. If a Rent be granted to husband and wife in fee, and the husband grants this in fee and dies, yet the wife may diſtrain, and ſhall not be put to her Action, 36. Aſſiſe 8. Tenant in taile of a Reverſion grants the ſame in fee with Warranty, and dies leaving Aſſets, the Tenant for life dies, and the Iſſue enters, and his entry congeable, for the Grant is meerly determined by his death, ſo that the Warranty cannot work, 38 H. 8. b. Diſcontinuance 35. If the King Tenant in taile grants the Land for life it is no diſcontinuance, for a Grant without Livery makes no diſcontinuance, but this ſhall not bind but during the life of the Grantor,

16 H. 7.

26 H.7.4. Fineaux, Tenant in taile of Services is like Tenant for life, and by his Grant nothing doth paſſe but for his life, and after his death the Iſſue may diſtrain, but if he brings a Formedon he ſhall be barred by the Warranty, for then he admits it to be a Diſcontinuance. And Hil. 39 Eliz. Rot. 941. In the Common Pleas between Keen and Cox, Thomas Jennings Tenant in taile, the Remainder to John his Brother, made a Leaſe for three lives, according to the Statute of 32 H.8. with Warranty, and dies without Iſſue, John being his heire who entered, and aggeed good, for the Eſtate of the Leſſee was determined by the death of the Leſſor without Iſſue, wherefore the Warranty could be no bar to the Remainder: And although the Iſſue in caſe of Grant of a Rent by his Anceſtor, may have a Formedon, yet that is no proof that the Grant is not determined, for although it be determined, yet may he admit himſelf out of poſſeſſion if he will, and is like to the Caſe where one takes my Rent, yet he gains no poſſeſſion by this, but that I may diſtrain notwithſtanding, yet if I will I may admit the poſſeſſion to be out of me, and ſo maintain an Aſſiſe againſt the Pernor.

And as to the opinion in the caſe of Fines in the 3. Rep. That if there be Tenant in taile of a Rent, or a thing which lies in Grant, who grants the ſame by Fine, and dies before the Proclamations made, that the Grant is not determined, but that the Proclamations may be made is grounded upon the reaſonable conſtruction of the Statute of the 4 H.7. of Fines, for otherwiſe the proviſion of the Statute that the fine ſhall be a bar cannot be, for that is the reaſon there given.

But it hath been objected, that becauſe it was not found by the Jury that Sir Richard Knightley was dead, it ſhall be intended that he is alive, and then his confirmation remains in force. Object.

To which I anſwer, 1. That his being alive cannot be preſumed, becauſe it is not ſo found, for although a Fee-ſimple being once alledged, ſhall be intended to continue untill the contrary appears, yet is it not ſo of an Eſtate-taile, or ſuch other particular Eſtate, but he who will take advantage of ſuch Eſtate ought to aver the continuance thereof, and that is a certain Rule in pleading, as in the 15 Ed. 3. Tenant in Taile of a Rent grants the Rent over, the Grantee when he makes Title there, ought to aver the life of the Tenant in Taile for by his death the Grant is determined; vide Dyer 73. 19 H. 6. 73. 5 H.7.39. 15 Ed.4.6. Anſwer.

And although there is a ſpeciall Verdict in our Caſe, which ſhall be taken more favourably then a Plea, yet is it all one, for I aggee that a Verdict need not be ſo formall as a Plea, but if it wants ſubſtance either on the one party or the other, this ſhall prejudice the party as much as if there had been a pleading, for the Court cannot give Judgment without ſome matter found, and therefore for as much as in our Caſe the life of Sir Richard makes for the Defendant, and all the validity of his Leaſe depends thereon, he ought to prove by evidence that Sir Richard was alive, ſo that the Jury might have found it, and becauſe it was not ſo found, the Court will not intend that he is alive, and therefore he ſhall be taken to be dead, and ſo his confirmation is finiſhed.

But admitting it ſhall be intended that he is alive, yet I conceive that immediatly upon the death of Valentine, his Eſtate which he had by the limitation of the uſe is determined and vaniſht, and he is remitted to his Eſtate-taile, and then his confirmation (as I have already proved) which doth charge the Eſtate which he hath by limitation of the uſe cannot endure.

Yet I will agree, that if Tenant in Taile makes a Feoffment to the use of himself for life, and after to the use of his Issue being within age, and dies, that his Issue shall not be remitted, as it is resolved in the Comment. 111. Townsends Case, and 207. Standbridge and Morgans Case. But the diversity is when the Estate-taile is discontinued whereby the Entry of the Issue is taken away, and he is put to his Formedon, there he shall not be admitted for the limitation of a use to him, for if he will take the Estate according to the use he ought to take it in the same manner as he had the use, but when no discontinuance is made of the Estate-taile it is otherwise, as in Townsends Case Comment. 111. Where Amy the wife of Roger Townsend was Tenant in Taile, and the Husband the 29. of H. 8. made a Feoffment to the use of himself and his wife for life, the Remainder to the use of their eldest Son for life, with divers Remainders over, the husband and wife died, and resolved that neither the wife nor the Son are remitted, and the reason there was, because that the Feoffment being made before the Statute of 32. of H. 8. was a Discontinuance, to the purging of which, the wife was driven to her Cui in vita, and cannot avoid this by Entry, as she might after the Statute of 32 H. 8 and therefore it is there agreed that if a Disseisor make a Feoffment to the use of the Disseisee, and he enters, he is remitted, because his Entry was congeable: And so Dyer 191. 2, & 3 Eliz. Land is given to the husband and wife, and to the Heirs of the body of the husband, the husband after the Statute of 32. H. 8. makes a Feoffment to the use of himself and his wife for life, the Remainder to the first Son for life, the Remainder to the right heirs of the husband, the husband dies, and it was resolved in the Court of Wards, that the wife should be remitted, notwithstanding the Statute of Uses, because that her Entry was congeable: and so 11 H. 7. 12. a. If the son disseiseth the Disseisor of his Father, and the Father dies, now forasmuch as that a right of Entry was in the Father, which by his death doth descend to the Son, he shall be remitted, notwithstanding that he came to the possession by his own proper and wrongfull Act, which is as strong against a Remitter, as an Agreement is to a Fine. And so if the Son and another doth disseise the Father, and the Father dies, the Son is remitted, and shall put out his companion.

And then Sir Richard being remitted, the Confirmation (as I have shewed before) being but a charge upon the Advowsun, is merrily determined; and so Littleton 148. B. If Tenant in Taile enfeoffs his Issue within age, who at full age doth grant a Rent-charge, or a Common, and the Father dies, the Issue shall hold discharged: and 40 Ed. 3. 448. If Tenant enfeoff a Stranger who grants a Rent, and enfeoffs his Son within age, and the Tenant in Taile dies, the Issue shall hold the Land discharged: and the same Law by Catesby, in 12 Ed. 4. 13. b. If Tenant in Taile after Discontinuance does repurchase the Land, and dies, and the reason is, because the Statute that was charged is vanisht. And although that the opinion of Bromley, 33 H. 8. Dyer 51. b. be that the Issue in such case shall not avoid a Lease for years made by him before his Remitter, yet the case of a Rent is there also agreed that it is determined by the Remitter, and the same Law is in Joynt-tenancy, if one doth make a Lease for years, so that he doth dispose of the possession, this shall bind the Survivor, but otherwise if he charges the Land with a Rent or other thing, and so is it where a husband hath a term in right of his wife, as in 7 H. 9. 2. 3.

And as to the last part of the Case: If the Fine levied by Valentine

cine the Son and Heir of Sir Richard Knightley doth give any force or ſtrength to the confirmation, or not, and I conceive that it doth not for three cauſes.

Firſt, the Fine is not with any Proclamations, ſo that it is no bar to the Intail, and therefore it is no more then a bare Grant of a Tenant in Tail.

Secondly, As this Fine is found, it cannot be intended to be levied by Valentine Knightley the Son of Sir Richard, but by a ſtranger of that name: for it is firſt found, that the 27 Eliz. Sir Richard did grant the Advowſon to Valentine Knightley then his Son and Heir apparent, and that the 36 Eliz. a Fine was levied between B. T. and H. Y. Plaintiffs, and Valentine Knightley Eſquire Defendant, without ſaying (the aforeſaid) and therefore I conceive, that Valentine Knightley Eſquire, who levied the Fine, cannot be intended to be Valentine Knightley Son and Heir of Sir Richard, and yet I agree the Caſe of 21 H. 7. 30. That when Weſtminſter is put into a Plea, and then a matter is alledged apud Weſtmonaſterium, without (prædict.) it ſhall be intended the ſame place, but when another addition is given to the perſon or place, it is otherwiſe, and therefore in the ſecond place if it be ſayd apud Weſtmonaſterium ſuper Thameſin, it ſhall not be taken for one place, 5 Ed. 6. Dyer.

New Book of Entries 650. 35, & 36 Eliz, In the Kings Bench, Upon a Treſpaſſe for breaking his Cloſe, and breaking and ſpoyling two Gates and three perches of Hedge, the Defendants preſcribed to go there in perambulation, upon which there was a demur, &c. and adjudged for the Plaintiff. 1. Becauſe that he ought to alledge this by cuſtome and not by preſcription. 2. Becauſe the Bar was, that the Plaintiff had obſtructed the way, Cum ſepibus & Januis, and did not ſay prædict. ſo that it might not be of the ſame Gates in the Declaration, and that is there ſaid to be a fault incurable. And although we are not in the nature of a Plea in our caſe but of a ſpeciall Verdict, yet as I have ſhewed before, that is all one where it wanteth matter of ſubſtance.

Thirdly, the Confirmation is utterly defeated and avoided by the Remitter to Sir Richard Knightley, and therefore the Fine cannot revive it, 14. Aſſiſe 3. Tenant in Taile doth charge the Land and dies, and the Iſſue does enfeoff a ſtranger, he ſhall hold the Land diſcharged, becauſe the Land was once diſcharged by his Entry, and ſo ſhall the Iſſue do that re-purchaſeth the Land, 19 Ed. 3. Reſceit 112. Tenant in tail acknowledgeth a Statute and dies, and the Iſſue enfeoffs a ſtranger, againſt whom the Conuſee ſues out execution, and adjudged there good, but yet it was denyed in 11 H. 6. 26. b. by Paſton; and Comment. 437. Smith and Stappletons caſe. And Trin. 15 Jac. This Caſe was argued by Sir Tho. Coventry the Kings Solicitor, for the Plaintiff, & by Sir Hen. Yelverton the Kings Attorney for the Defendant. And Hil. 15. Jac. by Serjeant Chidborn for the Plaintiff, and by Serjeant Harvy for the Defendant. And Paſch. 16. Jac. without any argument by the Judges agreed for the Plaintiff; and thereupon Judgment was given that the Plaintiff ſhould recover. Judgment.

Mich. 14 Jac. Aſhfeild againſt Wrendford.

IN a Writ of Error to reverſe a Judgment given in the Common Pleas for the now Defendant againſt the Plaintiff, in an Action of Debt upon

a Bond of two hundred Marks made the first of *October*, 9 *Jac.* In which the now Plaintiff, then Defendant, did plead that *Gregory Havard* was possessed of five Cowes, thirteen Sheep, and of certain Hay, Wheat, Rye, Pease, Barley, Oates, and Fetches, not Threshed. And some speech being had between the said *Gregory* and one *John Ashfeild*, for the buying thereof, whereupon the said *Gregory* did affirm the same to be twenty Loads of Hay, thirty of Wheat, a hundred of Rye, *&c.* whereupon before the making of the Bond, *viz.* the last of *September*, the 9 *Jacob.* It was agreed between the said *Gregory*, and the said *John*, that the said *John* should pay for the said goods seventy five pounds, and that a Bond should be made, in which should be contained that the said now Plaintiff, with the said *John Staret*, were bound to *Cuidam Edward Wrensford* in two hundred Marks upon condition for the payment of the said seventy five pounds, which writing was to be delivered to the said *Gregory*, as a Schedule to be kept, upon condition that the said *Gregory* before the said day of payment should go to the house of the said *John* in *Pixley*, to account with him for the said Goods, and if thereupon any of the said Goods should be wanting, if the said *Gregory* shall be content to make the same up, that then the Writing should be delivered to the said *Edmund*, otherwise it should remain as a Schedule, whereupon the said Writing mentioned in the Declaration was made and sealed, and delivered to the said *Gregory* upon condition aforesaid. And after the measuring of the Hay, there wanted eight Loads, *&c.* and the said *Gregory* did not come to the House of the said *John*, *&c.* And so pleaded it was not his Deed. And found for the Defendant, *&c.*

And I conceive that Judgment ought to be reversed.

For *Cuidam Edward Wrensford* cannot be intended the Plaintiff in the first Action, but a stranger of that name, as in *Dyer* 5 *Ed.* 6. Case of *Isham* and *Wither*: And then the aforesaid *Edward* to whom the Obligation is made and who joyned Issue, and appeared at the tryall, and at the return of the *Postea*, and for whom Judgment was given ought to be referred to *Cuidam Edward Wrensford*, whereof mention is last made in the Plea, and not to the Plaintiff in the Action, and so Issue is joyned by a stranger, and Judgment given for him, and not for the Plaintiff.

Judgment confirm'd.

But all the Court held that the Issue shall be intended to be joyned by the Plaintiff himself, and upon the Bond whereon the Declaration is made, wherefore Judgment was affirmed, *&c.*

Hil. 14 Jac. Newsham against Carew Knight; In the Exchequer.

IN an Ejectment, the Case was this. A Bishop makes a Lease of a Rectory to *I. S.* for 21. years, and dies, the Successor before the Statute 1 Eliz makes a Lease of this to *I. N. habend.* from the 20. *Decemb.* 1 *Eliz.* (being the day of the date for 56. years from thence next ensuing, the end of the Lease to *I. S.* and dies, and the 56. years are expired from the 20. of *Decemb.* 1 *Eliz.*

And if this second Lease be ended or not, is the Question?

And I conceive that the Lease shall begin from the 20 of December, and so it is ended before the Lease made to I. S.

For the argument of which case, the true sence and meaning of this ill pen'd Habendum is to be considered, for therenpon all the difficulty of this case doth depend: and as to that I conceive there are but four waies

ways to expound this Habendum: and if it be taken in any of theſe conſtructions, this Leaſe ſhall begin by computation from the 20 of December, 1 Elizab. and ſo ſhall end the 20 of December, 12 Jacob. which is before the Leaſe made to the Leſſor of the Plaintiff.

And the firſt way is to obſerve the firſt part of the Habendum, (ſcil.) from the 20 day of December then next following, to be onely material and good; and the laſt part, being repugnant thereto, is voyd.

The ſecond way is to take the firſt words of the limitation of the begining of the Eſtate to be voyd, and the laſt words (ſcil.) next following the determination and end of the term of I. S. &c. to be good.

The third way is to conſtrue as well the firſt as the laſt words of the Commencement to be voyd, by reaſon of the direct repugnancy in them.

And the fourth and laſt conſtruction is, to make ſuch conſtruction, as all theſe words by a reaſonable expoſition may agree together.

And according to any three of theſe conſtructions, (viz.) the firſt, the third, or the fourth, it is apparent, that the Leaſe to I. N. under whom the Defendant claims, did end the 20 of December, 12 Jacob. which was before the entry of Anthony Rudd the laſt Biſhop, and the Leaſe made to the Leſſor of the Plaintiff, and then this Leaſe is good: and therefore my endeavor is to prove, that this Habendum ought to be taken in any of theſe three ways, viz. the firſt, third, or fourth, and to diſprove that it cannot be taken in the ſecond way.

For the argument whereof, I ſhall ſpeak to the firſt and ſecond together: for that that I will ſpeak of the firſt, will be a manifeſt diſproof of the ſecond.

And as to this, I conceive that it is a Rule infallible in the expoſition of Deeds, that when two clauſes are contained in a Deed, the one contradicting the other, the firſt ſhall be good, and the laſt voyd. 2 Ed. 2. Feoffments and Deeds 94. One gave Land to R. with A. his daughter in Frank-marriage, habendum to R. and his Heirs, with warranty to him and his Heirs, they dyed, and their Son brought a Mordancestor: and becauſe the firſt clauſe was in Frank-marriage, and the other in Fee, the Juſtices doubted to which of them they ſhould have regard: and at laſt adjudged, that when there were ſeveral or two clauſes in a Deed repugnant, or of divers natures, that more regard ought to be taken to the firſt, then to the laſt. But otherwiſe in Wills, for there the laſt part of a Will ſhall controul the firſt; as if one firſt doth deviſe Land to A. and after deviſe this to another, and it is to both in fee, yet the laſt deviſe ſhall ſtand. 19 Ed. 3. Tayl 1. In a Writ of Ad Terminum qui præteriit, the Tenant pleaded a Gift in Frank-marriage to his Father and Mother by Deed, which was thus, that is to ſay, habendum to them for their lives, and reſolved, that the Gift in Frank-marriage being firſt, that it is good, and the Habendum being contrary, is voyd: and there the ſame rule is given, where two clauſes are contained in a Deed, and the one is contrary to the other.

And in Tracy and Throgmortons Caſe, Comment. 153. It is a ground in Law, that if the Habendum in a Deed be contrary to the Eſtate given by the premiſſes, the Habendum ſhall be voyd: as if a Grant be made to one and to his Heirs, Habendum for life, the Habendum is voyd. 13 H. 7. 23. and 24. and Dyer 272. A Termor does grant his term to another, Habendum after the death of the Grantor, adjudged that the Habendum is voyd. And 2 Ed. 4. If one releaſe all his right in B. acre, which he purchaſed of I. S. and in truth he did not

purchaſe

purchase it of I. S. but of another, or else had it by descent, yet is the release good, for the first clause shall stand, and the other shall be voyd. And Dyer 292. b. One having a Close called Callis, lying in Hurst in the County of Wilts, does make a Lease of his Close called Callis in the County of Berks, and adjudged that it shall pass, for the first words shall be, and the other shall be voyd. And Dyer 32 H. 847. 6. a Lease was made for life without impeachment of waste, and if it happen him to make waste, that then it shall be lawful for the Lessor to enter. Shelley conceived there, that the condition was voyd, because it was repugnant to the former Grant; but some conceived, that the Grant shall be intended, that he shall not be punished by action. Whereupon I collect, that if the condition in the last clause cannot agree with the first, the last is voyd: and so Dyer 56. 6. If I release to A. all actions which I. S. hath against him, the Release is good; and the words (viz.) which I. S. hath against him, are voyd: for by words subsequent, a Deed may be qualified and abridged, but not destroyed.

And as to the third manner of exposition (viz.) to construe all the words of the limitation, as well the first as the last, to be voyd. There is a Rule in Law, that when words in a Deed, Plea, or Record, are so repugnant, that the true sence thereof cannot be known to the Court, what is to be judged or construed upon them, that all shall be taken to be voyd, as appears by divers Books: 33 H. 6. 26. In an action on the Case, wherein the Writ was, that whereas the Plaintiff had a way by reason of his tenure, the Defendant had levyed a Wall, whereby his way was stopped; and there Prisot said, that the Writ was not good for the repugnancy: and 9 H. 7. 3. a. One pleaded Null tiel Record & hoc paratus est verificare per idem Recordum; this was adjudged insufficient, because the Plea is repugnant, viz. the first part which is not a Record, and the last that there is such a Record: and Dyer 70. 5 Edw. 6.

And so here, if these two limitations in the begining of this Lease are so repugnant one to the other, that they cannot consist together, then both shall be adjudged voyd: and then there being no certain time put for the begining of the Lease, the Lease shall begin presently; as in 3 Ed. 6. 6. A man made a Lease for years to commence after the end of a Lease made to I. S. and in truth I. S. had no Lease, the Lease shall begin presently.

And as to the fourth manner of exposition, I conceive that these ambignous words shall be construed [if it may be] that all may be good as to a reasonable exposition: and that is, that the 56 years shall begin from the 20 Decemb. 1 Eliz. but the Lease does not take effect in possession until the end of the other Lease; for terminus annorum hath two significations, scil. one the time or number of the years, and the other the Estate or interest of the term; and therefore if one does grant his term, the Estate does pass thereby: and this diversity is taken and explained the 35 H. 8. 6. and in Cooks 1 Rep. Cheddingtons Case. So that I conceive that the first words in the Habendum here ought to be applyed and referred to the time or number of years, according to the first definition of the term; and the last shall be applyed to the last definition, and shall be taken onely as words explanatory put in for better caution by the Bishop to avoyd contention between the Lessees, viz. That the last Lessee shall not meddle with the possession until the end of the first term: and by this construction, and no other, may all the words agree together: Dyer 9 Eliz. 261. 6. Abbot and

Covent

Covent did make two Leaſes of two parcels of Land to two perſons, 1531. for 31 years, and after the ſucceſſor 1535. reciting both the Leaſes, did make a new Leaſe to the other in theſe words: Noveritis nos prædict. Abb. &c. dictis 31 annis finitis & complet. conceſſiſe to the Leſſee the ſaid Land, holden from the day of the making of theſe preſents (termin. prædict. finitis) until the end and term of 31 years from thence next following. And the Juſtices of the Common Bench held, that it ſhall commence to take effect in poſſeſſion at the end of the former term, and not before: and [from the day of the making of theſe preſents] is but a declaring of the firſt ſentence, which is obſcure to ſome intents; and if it were not ſo expreſſed, the Leſſee ſhall have but a Leaſe for four years, which was not the intent of the parties, as it ſhould ſeem; but the Court of the Kings Bench was on the contrary: But afterwards the caſe was reſolved upon another point, viz. That the Leaſe was voyd, becauſe that the words [a die confectionis, &c.] were razed by the Leſſee himſelf. But admitting that in this caſe the Leaſe ſhould not begin until the end of the firſt Leaſe, yet that is no proof, that in our caſe the Leaſe ſhall not begin preſently: for in this caſe of the 9 of Elizab. the true Grant in the premiſſes does ſhew the intent of the parties to make a Leaſe in Reverſion, and that ſhall controul the words in the Habendum [a die confectionis:] alſo theſe words are qualified by other words in the Habendum, viz. termino prædict. finito. Thirdly, the former Leaſe is recited as a good Leaſe without doubt, but in our caſe the firſt Leaſe is not received as a Leaſe in truth, but is termed a pretended Leaſe: and yet in this caſe there were diverſities of Opinions, if the Leaſe ſhall commence preſently or not. And Mich. 10 Jacob. Thomas Moor brought an Ejectment againſt John Muſgrave upon a Leaſe made to him by William Moor the fifth of May, 10 Jac. of a Meſſuage, &c. in C. in the County of Cumberland, habendum from the Feaſt of the Anunciation laſt paſt for 21 years, whereby he entred and was poſſeſt until the Defendant the ſame day did eject him: To which the Defendant pleaded Not guilty. And the Jury found, that William Moor was ſeiſed in Fee, and made a Leaſe to the Plaintiff, habendum from the Anunciation of the Virgin Mary laſt paſt, for the term of 21 years next enſuing the date hereof, &c. And Judgment was given for the Plaintiff, whereby it appears that the term ſhall begin from the firſt limitation.

And after the Caſe was argued on the Bench by all the Judges, and Denham, Bromley, and Tanfield were of Opinion for the Defendant: wherefore Judgment was given againſt the Plaintiff. Judgment.

Michaelm. 14 Jacob. Standiſh againſt Short in the Exchequer.

IN an Ejectment on a Leaſe made by George Walker Parſon of the parish of S. John Evangeliſt in London, 14 Junii, 14 Jac. of a Meſſuage called the Swan in the ſaid Parish, habendum from the Anunciation laſt paſt for three years, whereupon the Plaintiff was poſſeſt, until he was ejected by the Defendant the 15 Junii in the ſame year: And upon Not guilty pleaded, the Jury found,

That the ſaid Meſſuage did lie within the City of London, and that it was an ancient City, and that by the Cuſtom every Citizen being a Freeman of London, by his Will in writing may devile all his houſes and

and Lands, and any part thereof in the ſaid City, as well in Mortmain without licenſe, as in any other manner in Fee, in Tayl, for life, or for years, &c. and that the ſaid Cuſtom, and all other Cuſtoms of the ſaid City, the 7 of Richard the ſecond, were confirmed by Act of Parliament. And they found that William Daringre, Citizen and Freeman of London, the tenth of May, 34 of Ed. the third, was ſeiſed in Fee, as well of the ſaid Meſſuages, as of other Lands in London in Fee; and the tenth of May, 1360. and in the 34 of Ed. 3. made his Will in writing, and thereby did deviſe the ſaid Meſſuages by the name of his Tenements in theſe words following. And firſt he deviſed a Quit Rent of 40s. a year to the Parſon of St. John Evangeliſt, and his ſucceſſors, to pray for Souls: and he did deviſe to the ſaid Parſon and his ſucceſſors, a Chamber with two Cellars thereupon lying on the Northſide of his Tenement, to pray for Souls: And then followed this clauſe: Item, lego & ordino quod unus capellanus celebret in Eccleſia Sancti Johannis prædict. ſtatim poſt deceſſum meum, pro anima mea & animabus prædictis, & quod idem capellanus percipiet annuatim de Tenemento meo 8 Marks pro ſtipendio; & volo quod idem capellanus ad matutinas miſſas & omnibus aliis horis Canonicis in Eccleſia prædict. interſit per diſpoſitionem Rectoris ejuſdem qui pro tempore fuerit, & de reſiduo ſi quod clarum fuerit ultra ſolutionem dict. tenementi. Volo quod Richardus filius Elizabethæ uxoris meæ ſcolatizando adjuvetur quouſque ad legitimam ætatem pervenit ad ordines Sacerdotales percipiend. & cum Sacerdos fuerit, volo quod idem Richardus dictum cantarium occupet pro termino vitæ ſuæ ſi voluit, & ſi non de reſiduo prædicti tenementi neque de cantario nihil percipiet, ſed Rector antedictus qui pro tempore fuerit, & 4 magiſtri ſufficient. Parochiam præſentent & invenient unum capellanum ad dictum Cantarium occupandum in perpetuum de tenementis meis in dominica Parochia non legatis, ſalvo quod lego de dictis tenement. meis Rectoribus & Succeſſor. ſuis illam manſionem quam Johannes Sherman modo tenet reddend. inde annuatim tot. quiet. reddit. de omnibus tenementis meis exeunt. Item, volo quod ſi dominica Cantuaria pro defectu dicti Rectoris vel Succeſſor. ſuorum retardavit, & ultra 40 dies inoccupat. fuerit, quod dict. camer. ſolarii & manſiones erunt Gardianis de ponte. Et id quod clarum fuerit, & reſiduum ultra ſolutionem & reparationem prædict. volo quod ponatur ſub cuſtode Rectoris & 4 Parochianorum ad providend. ornamentum & libros dominicæ Eccleſiæ.

And the Deviſor died the ſame day ſeiſed of the ſaid Tenements.

And they further found, that the Meſſuages wherein, &c. is parcel of one of the Tenements in the Will, out of which the Teſtator did ordain, that the ſaid Chaplain ſhould have eight Marks for his ſtipend, and that Henry Tyting was Parſon of the ſaid Church at the time of the death of the Deviſor, and that the Church was void by his death, and that the Leſſor was preſented, admitted, inſtituted and inducted: and that he entered into the ſaid Meſſuages upon the Defendant, and did expel him, and made the Leaſe to the Plaintiff, who entered and was poſſeſt until the Defendant ejected him. And whether the Defendant was guilty or not, they prayed the Opinion of the Court.

And I conceive that the Plaintiff ought to have Judgment.

And the Queſtion is, Whether the Parſon by this Deviſe ſhall have the houſes, the ſaid eight Marks are limited to be paid to the Chaplain or not? And I conceive that the Parſon ſhall have it.

In the Comment. 413 b. It is taken for a Rule, that in expounding

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of Wills, the Law ſhall interpret the words of the Deviſor, and ſhall direct their operation according to the intent of the Deviſor: ſo that to the matter, form, and order limited in laſt Wills, the Law does ſubmit to them, and wills that they ſhould be obſerved. And although that in Conveyances or Deeds executed by men in their life times, the Law doth require apt words to make Eſtates, yet in Wills the intent of the Deviſor is ſufficient, either to limit the Eſtate, or to deſcribe the perſon that ſhall have it.

And therefore if Land be given to one in perpetuum, if it be by Grant or Feoffment, yet there paſſeth but an Eſtate for life; but if it be given by Will, it is an Eſtate in Fee: and 4 Ed. 6. Eſtates 78. If one deviſeth his Land to another, paying 10 l. to his Executors or any other perſon, the Deviſee hath an Eſtate in Fee: ſo if one deviſeth his Land to give or diſpoſe of, or ſell at his will, this is a Fee-ſimple. 19 H. 8. 96. 7 Ed. 6. Deviſe 38. And the reaſon in all theſe caſes is, becauſe that by theſe words the intent of the Deviſor doth appear that a Fee ſhall paſs, and therefore the defect of words ſhall not defeat his intent. And as the intent is ſufficient without apt words to make an Eſtate, ſo is it alſo to deſcribe the perſon who ſhall take the Deviſe, although he be not formally named according to the preciſe rule in Grants: as in 21 R. 2. Deviſe 17. where one deviſed Land to one for life, the remainder to another for life, the remainder to the Church of St. Andrews in Holborn: and it was adjudged, that after the death of the Deviſees for life, the Parſon of the Church ſhall have the Land, for in as much as the Church was not capable, it ſhall be taken, that the intent of the Deviſor was, that the Parſon, who is as it were the Father of the Church, and ſo the Head of it, ſhould have the Eſtate. And in the 13 H. 7. 17. In every Deviſe the intent of the Deviſor ſhall be taken: for if a man deviſeth all his goods to his Wife, and that after his decaſe his Son and Heir ſhall have his Houſe, although that no Deviſe of the Houſe be made to the Wife by expreſs words, but by implication, becauſe the Heir is not to have the Houſe during the Wifes life, yet becauſe the intent of the Deviſor was, that the Son ſhould not have it during the life of his Wife, ſhe ſhall have the Houſe for her life: To which all agreed.

Then in our caſe, 1. The Deviſor willeth, that a Chaplain ſhall celebrate for his Soul, and that he ſhall have eight Marks out of his Tenements yearly for his ſtipend, but if he had ſtayed there, the Deviſe ſhould have been voyd, for the Chaplain is not ſuch a perſon as may take theſe eight Marks as a Rent: and therefore he goes further, and firſt he limits what ſervice the Prieſt ſhall do, and this he appoints to be done by the diſpoſition of the Parſon.

2. He doth diſpoſe of the reſidue of the profits of the Tenement for ſuch a time, (viz.) until R. ſhall be 24 years of age, and be a Prieſt; and doth deviſe, that he ſhall be preferred to the Chantery before any other, if he will accept it, and if not, that he ſhall have nothing.

3. He makes proviſion for the perpetual continuance of the Chaplain, in theſe words, (ſcil.) That the Parſon and four of the beſt of the Pariſhioners ſhall preſent and finde a Chaplain to perform the ſaid Chantery for ever, *de tenementis meis ſuperius non legat.* which is the ſaid Tenement out of which the ſaid eight Marks are limited to be payd.

4. He doth inflict a penalty upon the Parſon, if the Chantery ſhould be voyd, (ſcil.) That the other Land deviſed by him to the Parſon, ſhall

go to the Wardens of L. Bridg, for the reparation thereof.

5. He makes a perpetual disposition for the residue of the profits of the Tenement, (viz.) That they shall be put into a Chest under the custody of the Parson and four of the Parishioners, to buy ornaments and Books for the Church.

And these parts of the Will being well considered (as I conceive) it will be clear, that the intent of the Devisor was, that the Parson should have this Tenement; for here the main scope of his Will is, that a Chaplain shall be maintained perpetually, and that he shall have eight Marks stipend out of that Tenement, and that it shall be provided and found by the Parson and four of the Parishioners, and that the residue of the profits shall be bestowed by them to buy ornaments and Books for the Church: so that a perpetual charge is imposed upon the Parson, (scil.) to finde the Priest, and to buy ornaments, &c. and this charge is to be defrayed with the profits of the Tenement, and that can be done by none but by him that shall be owner of the Tenement: and therefore it follows that the Parson shall have the Tenement.

And that such implication in a Will is sufficient to make an Estate, is proved by the 15 H. 7. 12b. If one devises his Land to be sold for payment of his Debts, the Executor shall sell the Land, for because the charge to pay Debts lies upon the Executors, his intent shall be taken to have them sell the Land: and 22 and 23 Elizab. Dyer 371. A man seised in Fee of divers Mannors, doth devise them to his Sister in Fee (except my Mannor of D. which I do appoint to pay my Debts) and makes two Executors, and dyes; and one Executor dyes, and the other sells the Mannor, and adjudged good, for so his intent shall be taken, and not to relinquish it to his Sister: and 19 H. 6. 24 and 25. and 1 Edw. 6. Devise 36. If one devise that his Executor shall sell his Land, this is no devise of the Land to them, but an authority; for they may perform the Devisor to sell the Land, although they have no Estate therein, and the Vendee shall be in by the Devisor: but if one devise that his Executors shall grant a Rent-charge out of his Land, or that they shall give the Land in Fee or in Tayl to I. S. this is an implyed Devise to them, for otherwise they cannot perform the intent of the Devisor. Trin. 9 Eliz. 256. and so in the 40 Assis. 26. One did devise his Land in L. to A. and his Heirs to finde twelve Marks for two Chaplains, and grants that the Parson and the Parish may distrein for this if it be behinde: and there it is debated whether the King shall have the twelve Marks or not: and it is agreed there, that the Chaplains have no Estate in it, because they are removable at the will of A. but because the Distress is given to the Parson who is perpetual, it was adjudged that the King shall have the twelve Marks: whereupon I do observe, that by this Distress limited to the Parson and the Parishioners, the twelve Marks were vested as a Rent in the Parson, and so made it a Mortmain.

Object. But it may be objected, That the last clause in the Will for the disposing of the residue of the profits, does go onely to the Land devised to the Wardens of the Bridg.

Answer. But this cannot be: First, because that the Land devised to them, is onely a Chamber, and a mansion of little value, and that is to repair the Bridg; and that is a work of such charge, that no surplusage can be intended. Secondly, The clause is, Id quod clarum fuerit ultra solutionem & reparationem, &c. which are the very words in the clause used

uſed for the diſpoſing of the reſidue to R. for the time, and cannot be referred to the Deviſe of the Wardens of the Bridge, becauſe that the things deviſed to them are apparently to be for the reparation only, and no payment is limited out of it, but the Tenement out of which the Stipend is to be payd, is firſt charged with this payment, and then with the reparation of the Tenement, and then with the Ornaments and Books for the Church.

And afterwards this Caſe was argued by Coventrey the Kings Solicitor for the Plaintiff, and by S. Chibborne for the Defendant. And Mich. 16. Jac. The Barons (viz.) Tanfeild, Bromley, and Denham did openly declare their opinion, that the Land was not demiſed to the Parſon by this Will, and thereupon they commanded Judgment to be entred for the Defendant which was entred accordingly.

Trinit. 15 Jacob. John Adams againſt Roger James Knight, and others.

IN a Replevin for taking of twelve Cowes and two Calves, the twenty fourth of May, the 14. of King James, at Upminſter, in a place called Nelfeild, alias Newfeild, ad damnum 10 l.

The Defendants did juſtifie the taking, &c. as Bayliffs of Thomas James, and Moily Deale, for that the place contained twenty acres of Paſture: And that William Latham was ſeiſed in Fee of the Manor of Upminſter, whereof the ſaid twenty acres are parcell, and the twenty fifth Maii, 13 Eliz. deviſed the ſame to George Wiſeman, excepting one Cloſe of Land or Paſture called Crouckfeild, containing by eſtimation fifty acres, and a parcell of a Cloſe called Ecrowchfeild, containing by eſtimation ſixty acres, and all Woods, and Frees, and Profits of Court Leets, Waifes, Eſtrayes, Eſcheats, Heriots, Reliefs, Goods, and Chattels of Felons and Fugitives, Deodands and Treaſure Trove. Habendum from Michaelm. 1576. for ſixty one years, rendring forty pounds Rent at the Annunciation and Michaelmas.

The firſt of Octob. 1576. George Wiſeman entred.

The twentieth of Auguſt, 35 Eliz. William Latham by Deed inroled for the conſideration of two thouſand pounds, did bargain and ſell the Manor to Roger James Father of the Defendant Roger in Fee: and the 15 Decemb. 39 Eliz. Roger James the Bargainee did deviſe the third part of the Manor to John his Son, after whoſe death John was ſeiſed of the third part in Fee.

The ſeventh of Auguſt, 11 Jacob. John James by Indenture for a thouſand pounds paid by Thomas Fryth, did bargain and ſell to the ſaid Thomas Fryth and Moyle Deale, the ſaid Reverſion of the ſaid third part. Habendum from the ſaid ſeventh of Auguſt, for a hundred years, (ex intentione) that they ſhould grant or aſſign the ſaid term, to Thomas Fryth, or his Aſſignes, upon condition that he ſhould pay a thouſand pounds to the ſaid Roger James, viz. five hundred pounds the ſeventeenth of Auguſt, 1614. and five hundred pounds the ſeventeenth of Febr. next after. And becauſe ſixty pounds thirteen ſhillings foure pence was behind to the ſaid Thomas James, and Moyle Deale for halfe a yeare, ending at Mich. 12 Jac. they did well juſtifie the taking, &c.

The Plaintiff ſaid, that after the ſeventh of Auguſt, 11 Jac. and before the ſaid Mich. 12 Jac. viz. the ninth of Auguſt, the 11 Jac. the ſaid Thomas James and Moyle Deale did bargain and ſell to the ſaid Thomas Bar.

Fryth all their Eſtate in the ſaid third part, whereby he was and yet is poſſeſſed.

Replication. The Avowants replyed that the Bargain and Sale was upon Condition to pay the ſaid thouſand pounds to the ſaid Roger James at the ſaid days of payment, and that Thomas Fryth did not pay the ſaid five hundred pounds the ſeventeenth of Auguſt, 1614.

Rejoynder. The Plaintiff rejoyned, that after the ſaid ninth of Auguſt, 11 Jac. (ſcil.) 10. Auguſt, 11 Jac. the ſaid John James was ſeiſed in Fee of the Reverſion of the third part expectant upon the eſtate of the ſaid George Wiſeman.

And that the tenth of Auguſt, 11 Jacob. John James by Indenture inrolled did bargain and ſell the ſaid Reverſion to the ſaid Thomas Fryth and his heires.

That the ſeventeenth of Auguſt, 11 Jac. John James by Indenture dated the aforeſaid ſeventh of Auguſt, 11 Jac. for a thouſand pounds, did bargain and ſell the ſaid third part to the ſaid Thomas James, and Moyle Deale, Habendum from the ſaid ſeventh of Auguſt, 11 Jac. for a hundred years, and that they after (ſcil.) the aforeſaid ſeventeenth of Auguſt, 11 Jac. did bargain and ſell to the ſaid Thomas Fryth upon condition before expreſſed. Abſque hoc, that the ſaid John James did bargain and ſell to the ſaid Thomas James, and Moyle Deale, the ſaid Reverſion before the ſaid tenth of Auguſt, 11 Jac. And abſque hoc that the ſaid Thomas James and Moyle Deale, before the ſaid tenth of Auguſt, 11 Jac. did bargain and grant the ſaid Reverſion to the ſaid Thomas Fryth, on condition as aforeſaid.

Upon which the Avowants demurred, and ſhewed for cauſe, that this is a departure from the Bar, and that the ſaid Rejoynder is in it ſelf repugnant.

And I conceive that Judgment ought to be given for the Plaintiff in the Replevin, for that the Conuſance is utterly inſufficient for three cauſes.

1. The Defendants make Conuſance as Bayliffs to Thomas James, and Moyle Deale, and do endeavour to entitle themſelves to a third part of the Reverſion and Rent upon the Leaſe to Wiſeman, by the Deviſe of Roger James, and it doth not appear in all the Conuſance that Roger James was dead before the Grant made by John James to the ſaid Thomas James and Deale; for it is not ſet forth that he died, but only by implication (ſcil.) the bargain and ſale by Latham is pleaded to Roger James lately dead, which doth refer to the time of the plea which was long after the Grant to Thomas James, and Deale, and after the Rent due and the taking of the Diſtreſſe, then it is alledged, that after the death of Roger James the Deviſor John James entred, which is not ſufficient, becauſe it is not alledged in fact that he dyed, or when he dyed.

And all the Court agreed the Avowry inſufficient as to this exception.

Secondly, the bargain and ſale of the Reverſion by John James to the ſaid Thomas James, and Moyle Deale is pleaded to be made the ſeventh of Auguſt, 11 Jac. Habendum from the aforeſaid ſeventh of Auguſt, for a hundred years, whereby the day it ſelf is excluded, and ſo the Grant is to take effect in the future, which cannot be by the Rules of Law: as in Bucklers Caſe, 2. Rep. where Buckler Tenant for life in Mich. Term. 20 Eliz. made a Leaſe for four years, the Leſſee entred, and the Leſſor did grant the Land, habendum from Midſomer next for life, the Leſſee after

after Midſomer did attorn, and adjudged that the Grant was void, and in Barkwicks Caſe, 5: Rep. the reaſon thereof is given, becauſe that if the Grant ſhould be good, the Grantor ſhould have a particular Eſtate (ſcil.) during the firſt day of the date, or in the mean time untill the Grant did begin to take effect, without any Donor or Leſſor which is againſt the Rules of Law.

And although this Grant of the Reverſion be but for years, yet is it all one, for the diverſity is between a Leaſe for years, made Tenant in Fee or for life to commence in future, and a grant of a Reverſion, for in the firſt Caſe it is but a future Charge upon the Land, ſo that the Leſſor hath his former Eſtate untill the Leaſe doth begin, and the Leſſee hath no Term but only intereſſe termin. and therefore Hil. 38. Eliz. in the Common Pleas, between Row and White, it was agreed, that if the Leſſor be diſſeiſed before the Leaſe begins, the Leſſee after the day of the Commencement may grant the term, otherwiſe where a Leſſee for yeares in poſſeſſion is outed by an eſtranger, for there his Term is turned into a Right, but in the firſt Caſe he hath not any Term in eſſe, and therefore it cannot be turned into a Right, nor any wrong done thereunto.

And for direct Authorities in this Caſe, 29 Eliz. in the Common Pleas, the Counteſſe of Kents Caſe; Where one having a Reverſion in Fee does grant this, Habendum after the death of I. S. for years, and it was adjudged a void Grant: And Trin. 39 Eliz. Johnſon and Somerſet in the Common Pleas, Leſſee for life grants the Reverſion, Habendum a die dat. for ten years, and adjudged a void Grant. And in the Comment. 155. by Brown, If one having a Reverſion does grant it habendum after a day to come for years, this is a void Grant, for if it may be granted from a day to come, the Grantor ſhall have a particular Eſtate in the mean time by his own making, which cannot be, that one may be Leſſor to himſelf, or diminiſh his own Eſtate, and there it is taken for a Rule, that when there is a Rent in Eſſe, or a Reverſion, &c. a man cannot make this to be in eſſe for a time, and to ceaſe for another time, or to grant it to another after the death of any, or from a day to come, relinquiſhing to himſelf an Eſtate in the mean time: And in the Comment. 197. b. Adams againſt Wortesbey, agreed there, that a Reverſion cannot paſſe as a Reverſion, according to the common underſtanding thereof from a day to come.

But Haughton conceived, that this Caſe being a bargain and ſale whereby the uſe doth paſſe firſt, this may well paſſe from a day to come. Quod nullus dedixit.

Thirdly, It is not averred that the twenty acres in which the Diſtreſſe was taken, was not part of the Cloſes excepted, ſo that it may be part of them, and then no Diſtreſſe for the Rent can be taken there.

And although it may be gathered by ſome words in the Bar to the Avowry, that the place where, &c. was parcell of the Land deviſed to Wiſeman, yet this ſhall not help the Counſans, as in Cokes 7. Rep. fol. 24, & 25. where one having Land in Fee, and another Land for years, did grant a Rent for life out of both, the Grantee diſtrained for the Rent, and avowed that the Rent was granted out of the Leaſe land amongſt other lands, whereas he ought to have alledged the Rent to be granted out of the Land in Fee only, and although the Plaintiff in his Bar to the Avowry hath ſhewed the truth of the Caſe, yet this will not make the Avowry which wants ſubſtance to be good.

And

Judgment. And all the Court did agree the Avowry to be naught for this exception. Wherefore Judgment was given for the Plaintiff in the Replevin.

Mich. 14 Jac. Webb and Jucks Caſe againſt Worfeild.

Rot. 266.

IN a Writ of Error to reverſe a Judgment given in the Common Pleas, for the now Defendant againſt the now Plaintiffs.

In which the Plaintiff did declare, that the Defendants the fourteenth of Febr. 9 Jac. at Ponick in a place called Brancefords Court, did take an Ore from the Plaintiff, ad damnum forty pounds.

The Defendants did acknowledge the taking of the ſaid Ore as Bayliffs to Elizabeth Ligon Widow, for that the place where, &c. contained two acres of Land, and that one Anne Ligon was ſeiſed in Fee of the Scite of the Manor of Bransford, and of ſeven Meſſuages, three Gardens, and a hundred and fifty acres of Land, forty two of Meadow, ſixty ſix of Paſture, five of Wood, and ſeventy of Furzes and Heath, in Ponick aforeſaid, Bransford Leigh, Newland, and Wick, whereof the place where, &c. is parcell.

That the ſixth of September, the twenty fourth of H 8. Anne Ligon did deviſe this to John Parſons and Anne his Daughter for ſeventy years, after the death of Elizabeth his wife, if they, or either of them ſhall ſo long live, rendring five pounds, four ſhillings, eight pence Rent, at the Annunciation, Chriſtmas, Midſummer, and Michaelmas.

That the eleventh of Auguſt, 1534. Elizabeth Parſons died, whereupon John and Anne Parſons entred.

And Ligon dies, whereby the Reverſion deſcended to Sir Rich. Ligon her Son and Heir, and Sir Richard died, whereby the ſame deſcended to William Ligon his Son and Heir, who died alſo, whereby the ſame deſcended to Richard Ligon his Son and Heir, who died alſo, and the ſame deſcended to Sir Richard Ligon his Son and heire, who Hil. 33 Eliz. did levy a Fine Sur Conuſans de droit come ceo, &c. to the uſe of himſelf for life, the Remainder to the ſaid Elizabeth Ligon, then his Wife for life, the Remainder to the Heirs of the body of Sir William, the Remainder to the right Heires of Sir William.

10 May 4. Jac. John Parſons died.

Paſch. 6 Jac. Sir William Ligon and Elizabeth his wife did levy a Fine to the Plaintiff, to the uſe of the Plaintiff for the life of Sir William, the Remainder to the ſaid Elizabeth for her life, the Remainder to the Plaintiff in Fee.

Sir William dies, whereby the Reverſion does remain to Elizabeth his Wife.

And for ſeventy eight pounds, ſix pence of the ſaid Rent for three quarters of a year, ending at Chriſtmas, 9 Jacob. they did acknowledge, &c. and they averred the lives of the ſaid Elizabeth Ligon, and the ſaid Anne Parſons.

Bar. The Plaintiff ſaid, that the Fine levied by Sir William and Elizabeth his wife, was to the uſe of the Plaintiff and his Heirs, and juſtified the putting in of the ſaid Ore by the licenſe of the ſaid Anne Parſons. Abſque hoc, that the ſaid Fine was to the uſe of the Plaintiff for the life of Sir William, the Remainder to the ſaid Elizabeth for life, the

the Remainder to the Plaintiff in Fee, as the Defendants alledged, and ſo they were at Iſſue.

And the Jury found the Leaſe and the deſcent of the Reverſion, and the Fine, 33 Eliz. and the uſe, and the death of John Parſons, ut ſupra.

And that the one and twentieth of September, 5 Jac. Sir William *Ligon* and Elizabeth his wife did make a Deed of Indenture of the ſaid Tenements in theſe words:

This Indenture made, &c. between them of the one part, and the Plaintiff on the other part, whereby Sir *William* for ſeven hundred pounds before the enſealing and delivery paid to Sir *William* by the Plaintiff, did covenant that he and Sir *William* before *Chriſtmas* next, ſhould levy to the Plaintiff a Fine with Proclamations of the ſaid Tenements, which Fine and all Fines and Aſſurances to be had within ſeven years, ſhould be to the uſe of the Plaintiff and his Heirs, upon Condition that if Sir *William* and *Elizabeth*, or any of them, or the Heirs or Aſſigns of Sir *William* ſhould pay to the Plaintiff or his Aſſigns nine hundred forty three pounds at the Annunciation 1611. that the Eſtate of the Plaintiff ſhould ceaſe, and that Sir *William* and *Elizabeth* and his Heirs ſhould enter, and the Fine ſhould be to the uſe of Sir *William* and *Elizabeth*, and the heirs of Sir *William*: And Sir *William* covenanted with the Plaintiff that he and his Heirs untill the nine hundred forty three pounds be to be paid, ſhould have and enjoy to their uſe, under the ſaid Condition, and according to the meaning of the ſaid Indenture, and if default of payment ſhould be made, then after ſuch default, the Premiſſes and the Rents and Profits thereof if ſuch default ſhould be, ſhall be taken and enjoyed to their uſe, without any interruption of Sir *William* and *Elizabeth*, *&c.* and diſcharged and ſaved harmleſſe of all Incumbrances, *&c.* made by Sir *William*, *&c.* (except the ſaid Leaſe) and Sir *William* covenanted, that if the nine hundred forty three pounds ſhould be paid, to pay to the Plaintiff the charge of the aſſurance.

Paſch. 5 Jac. The Fine was levied by Sir William and his wife to the Plaintiff, and they found that the fifteenth of April, 6 Jac. the Conuſance of the Fine was made at M. in the County of Wilts, and that after the ſaid Conuſance, and before the ſaid fifth of September, Paſch. 20. Martii, 5 Jac. the ſaid Sir William made another Indenture between him and his wife of the one part, and the Plaintiff of the other part, whereby Sir William and Elizabeth for ſeven hundred pounds before paid to them by the Plaintiff, Sir William and Elizabeth did bargain ſell, and grant to the Plaintiff and his heirs, the ſaid Tenements upon the like Condition as aforeſaid, and Sir William did covenant that he and his wife ſhould make a further aſſurance by Fine, &c. and that all ſuch aſſurances ſhould be to the Plaintiff and his Heirs, under the ſaid Condition untill default of payment, and after ſuch default to the uſe of the Plaintiff and his heirs abſolutely, and if payment be made to the uſe of Sir William and Elizabeth, and the heirs of Sir William, and the Plaintiff did covenant that Sir William and Elizabeth, and their heirs, untill the Annunciation, 1611. ſhould have all the Rents and Profits of the Premiſſes, without interruption of the Plaintiff or his heirs.

That the eighth of December, 6 Jac. Sir William Ligon died, after whoſe death (ſcil.) the aforeſaid time quo, &c. the Defendants as Bayliffs to Elizabeth, did take the ſaid Ore in the ſaid place, for the ſaid ſeventy eight pounds, ſix pence of the ſaid Rent for three quarters, ending at Chriſtmas, 9 Jac.

But

But whether the Diſtreſſe was well or not, they prayed the advice of the Court, &c.

And upon this Verdict it was adjudged in the Common Pleas after many Arguments, that the Plaintiff ſhould recover.

For all the Juſtices did agree, that the ſaid Fine was to the uſe of the Plaintiff, and his Heirs, whereupon the Defendant brought this Writ of Error, and aſſigned the Error in the point of Judgment only.

And it was objected by the Councell of the Plaintiffs in the Writ of Error that, that it was apparent upon this aſſurance, that it was made for the aſſurance of the payment of ſeven hundred pounds lent by the Plaintiff to Sir William, and Sir William was to repay nine hundred forty three pounds which was full Intereſt, according to the rate of ten in the hundred, and then by the expreſſe Covenant in the firſt Indenture, the Defendant in the Writ of Error was to have the Rents and Profits of the Land alſo, whereby Worfeild ſhould have more then ten pounds in the hundred, and then the aſſurance is void by the Statute of Uſury, then, although by the laſt Indenture it is provided that Sir William and his wife ſhould have the Rents and Profits, untill the day of payment, yet this ſhall not bind the wife, for it is found expreſſly that ſhe did diſagree to this Indenture.

But I conceive that the Diſtreſſe was not well taken, but that the Fine was to the uſe of William Worfeild and his heirs, and ſo the Rent belonged to him.

And firſt as to the Objection, that the aſſurance is void by reaſon of the Statute of Uſury; that cannot be.

1. Becauſe it was not found that there was any lone of mony, or uſurious Contract, and therefore it may be and ſo it ſhall be intended, that the ſeven hundred pounds was paid bona fide, after the purchaſe of this conditionall Eſtate made to William Worfeild.

2. The Conſideration is for ſeven hundred pounds paid before the enſealing and delivery of the Indenture, ſo that if it be admitted that the ſeven hundred pounds was lent as Intereſt, yet it may be that this was lent ſo long before the making of the Indenture, that the nine hundred forty three pounds to be paid with the Profits of the Land, does not exceed the principall debt, according to the rate of ten pounds in the hundred. And that Uſury ſhall not be intended without it be expreſſly found by the Jury, vide Coke 10. Rep. the Caſe of the Chancellor of Oxford, fol. 56. Covin ſhall not be intended or preſumed in Law, unleſſe that it be expreſſly averred: and ſo was it agreed in the Caſe between Tyrer and Littleton, in the Common Pleas, for the taking of an Ore, The Defendant pleaded Not guilty, and the Jury found that Thomas Tyrer held certain Land of John Littleton by Rent and Herriot, : and the 42 of Eliz. did enfeoff John Tyrer his Son and heir who made a Leaſe to Thomas Tyrer for forty years, if he ſhould ſo long live, to the intent that Joyce whom he intended to marry ſhould not have her Dower during his life; Thomas died poſſeſſed of the Ore, and the Defendant took it for a Herriot. And they found the Statute of Fraudulent conveyances, &c. and it was adjudged that forasmuch as the Feoffment was not found by the Jury to be fraudulent, the Court could not adjudge it to be fraudulent, although the Jury had found circumſtances and inducements to prove the fraud: and in the 8. Rep. Lovedays Caſe, In an Information upon the Statute of Uſury, the Jury found that the Defendant did accept a certain ſumme above ten pounds in the hundred for forbearance of the money, but no lone of money was found

found: Wherefore it was adjudged that the Verdict was insufficient, and a new Venire was awarded.

Henden. The Fine shall be directed onely by the last Indenture, for that does controul the first Indenture. Count. Rutlands Case, Cook, Rep.

But all the Court agreed, that the Count shall be directed by the first Indenture as to the Wife, for her disagreement to the second Indenture doth prove & enforce her agreement to the first, and then the use limited by both Indentures being all one, (scil.) to the use of William Worfield and his Heirs, and no variance between them in the limitation of the use, it is clear that the use shall be to the Plaintiff and his Heirs.

Wherefore it was adjudged that the Judgment given in the Common-Pleas should be affirmed.

But Haughton said, that the Verdict was not good, for that the use being matter of fact, ought to have been found by the Jury, and not left to the Court. To which it was answered, that the Jury did conclude, That if the Distress was well taken, that the Fine was to ons use; but if not, then it was to another use, which was sufficient. Whereupon he assented to the affirming of the Judgment. Judgment.

Trinit. 15 Jac. The King and William Allen against Theophilus Newton. Rot. 318.

William Allen, as well for the King as for himself, did inform against Theophilus Newton, for that the Defendant not being assigned, named, or appointed to keep a Tavern within the Town of Tiverton, according to the Statute of the first of November, 13 Jacob. and for one hundred day between the first of November, and at the day of the Exhibition of the Information, to wit, the 26 of Octob. the 14 of King James, at Tiverton, did of his own authority keep and maintain a common Tavern; and within the said time did utter and sell Claret-wine, and White-wine, and Sack, and divers other kinds of Wine, to divers subjects of the King, by retail, contrary to the form of the Statute, whereby an Action did accrue to the King and the Informer, to have of the Defendant 505 l. for every one of the said hundred days; whereof the Informer prayed the moyety.

The Defendant, as to the keeping the Tavern, and uttering of the Wines the first of Novemb. 13 Jacob. and all the other days between the said first of Novemb. 13 Jacob. and the said 26 Octob. 14 King James, saving fourty of the said hundred days, did plead Not guilty. And as to the said fourty days he said that the King the fourth of January the 3d Jacob. by his Letters Patents under the great Seal, did grant License to Richard King and his Assigns, Thomas King and his Assigns, and John King and his Assigns, that the said Richard and his Assigns during his life, for him and themselves, their servants, deputies, and assigns, or any of them; and that the said Thomas and his assigns, after the death of the said Richard, for him and themselves, their servants and deputies, or any of them, during the life of the said Thomas; and so the said John, after the death of Richard and Thomas, &c. during the life of the said John, may have, use, occupy, and hold a Wine-Celler within the Town of Tiverton in the County of Devon, in domo mantionali in qua prædictus Richardus & Thomas & Johannes ad tunc inhabitabant, vel ex tunc in posterum inhabitur. infra prædict. Vill. de

Tiverton, de tempore in tempus vendere & utterare per retail (viz.) by the Gallon, Pottle, Quart, or Pint, or leſs or greater meaſure, all manner of good and wholeſom Wine of what kinde ſoever, as well within their houſes, as out of their houſes, at his or their pleaſure, and at and for ſuch price, as from time to time the ſaid Wines for reaſonable gain may be afforded, without any Impeachment, notwithſtanding the Statute of 7 Ed. 6.

That the firſt of September, 13 Jacob. Richard King dyed.

The laſt of Auguſt, 14 Jacob. Thomas King, by Deed ſhewn, did ordain the Defendant to be his Aſſignee, to draw and ſell all good and wholeſom Wines in the then Manſion Houſe of the ſaid Thomas in Tiverton, and to retail them without the ſaid Houſes for ſuch prices as for reaſonable gain may be afforded for one year: wherefore the Defendant after the ſaid laſt of Auguſt, and before the Exhibition of the Information, ſcil. within the ſaid fourty days, parcel of the ſaid hundred days, at Tiverton aforeſaid, in the then Manſion Houſe of the aforeſaid Thomas, as his Aſſignee, did hold a common Tavern, and did ſell and utter Claret, White-wine, and Sack, and other Wines by retail: And did aver, that he ſold the ſaid Wines for ſuch prices as he could reaſonably afford, and that they were good and wholeſom Wines; and that the ſaid Thomas is alive at Tiverton aforeſaid, and that Tiverton in the Letters Patents, and Tiverton in the Information, is all one Town.

And I conceive that Judgment ought to be given for the King and the Informer againſt the Defendant.

For the License is not purſued, for it is to keep a Tavern in the Manſion Houſe, in which the three parties did then inhabit, or ſhould after inhabit, whereby the King hath reſtrained this liberty to a certain place; and the Defendant doth juſtifie under the License of Thomas King, or his Aſſignee, to keep a Tavern in his Manſion Houſe, which is not warranted by the Kings License. And that every authority ought to be purſued ſtrictly, Dyer 177. a. Ceſtuy que uſe before the Statute of 27 of Hen. 8. did will, that A. B. and C. ſhould ſell the Land, and dyes, B. and C. cannot ſell the Land, for that it was a joynt authority to them all three: and the 27 H. 8. 6. A Warrant of Attorney to three jointly and ſeverally, to make livery, one of the three may make livery, but not two of them, by Baldwin: and 30 Ed. 3. 17. The King doth license one to alien his Manor of D. who doth alien it, excepting twelve acres, this License will not ſerve: and 3 Ed. 3. 5. One by Fine doth grant and render the Manor of D. to the Abbot of G. and his ſucceſſors, and ſhewed a Charter whereby the King gave leave to the Conuſee to render to finde two Chaplains, &c. and he would have levyed the Fine without mentioning of the Chaplains; whereupon the Court did refuſe it, becauſe it was disagreeing to the Charter of leave, and after he levyed the Fine according to the Charter: and in the 21 H. 7. 8. a. When the King grants a License, it ought to be ſtrictly expounded; as if the King ſhould License one to make a Feoffment by Deed, he cannot make it without Deed, and ſo e converſo: ſo that the License is always to be purſued, or elſe there is no Warrant at all. Vide Comment. 68. Dive and Manningham. If the King doth license one to alien the third part of his Land, and he aliens all, by Montague, the alienation is without warrant. And 23 H. 8. 6. Patent 76. If the King doth licence one to alien his Manor of D. and he doth alien it excepting one acre, the License ſhall not ſerve: and if the

King

King doth license one to impark an hundred acres, and he does impark them, and after adds ten acres, this is no Park. And 38 H. 6. 10. If the King grants a Leet to one in all his Land, he shall not have it, but in the Land which he had at the time of the Grant.

And this matter is enforced by the preamble of the Statute of the 7 Edw. 6. and the fifth, which is, For the avoyding of many inconveniences, much evil rule and resort of disordered persons to many Taverns newly set up, in very great number, in Back-Lanes and suspicious places within *London*, and otherwhere: whereby it is to be presumed, that the King did take notice of the House in which the parties did then inhabit, to be a fit place, and he trusted all of them, but would not trust any one of them.

This License cannot be granted over. 2.

12 H. 7. 25. In a Trespass for hunting in his Park, and killing of his Deer, the Defendant justified by a License given to I. S. his Master, under whom he as servant to him, and by his commandment made the Trespass; and resolved, that a License doth not extend but to him to whom it is given, and cannot be granted over: and with this accords 18 Edw. 4. 14. and Dyer 34 H. 8.

The Defendant hath not answered to the greatest part of the time contained in the Information, for the Information is from the first of Novemb. 13 Jac. and a hundred other days between the first of Novem. 13 Jac. and the 26 Octob. 14 Jac. and then the Defendant pleads not guilty the first of November, and all the other days between the first of November and the 26 Octob. saving fourty of the said days, and for the fourty days he justifies by vertue of a License the last of August, 14 Jac. so that it may be that the fourty days that the Information mentions were before this time, for he hath the benefit of all days between the first of Novemb. and the 26 Octob. and the Not guilty at the first of November and an hundred days between that and the 26 October, and the fourty days excepted in the [Not guilty] may be as well before the last of August as afterwards; and it is at the election of the Informer to charge the Defendant with fourty days, at what time he will between the first of Novemb. and 26 of Octob. As in a Trespass for breaking a Close, the Plaintiff may after upon a new assignment, or in evidence upon Not guilty pleaded, assign the Trespass in what Land he will within the same Town, although he hath many Closes there: and therefore in this case, the Defendant ought to have pleaded Not guilty for all the days, until the last of August, and then to have justified by his License. As in a Trespass, if the Defendant do justifie at another day by License, he ought to traverse the time before and after, for that the Plaintiff may charge him at what time he will. 3.

The Plea is, that the Defendant did sell his Wines at such reasonable prices as he could afford them, which is utterly insufficient, for he ought to have shewed what prices, so that the Court might judg whether they were reasonable or not: as in 22 Ed. 4. 40. the Lord Lisles Case, to shew a sufficient discharge of Rent. And although it would be tedious to shew the price of every Quart and Pint, yet he may alledg how he sells by the Quart of each kinde of Wine, especially of so short a time. 4.

And Michaelm. 15 King James, Judgment was given for the Defendant against the Informer, because it was not averred that Tiverton was a Corporate or Market Town; and the Statute gives several Judgment.

penalties, one for keeping of a Tavern in such a Town without License, and another penalty for keeping of a Tavern in other places without License.

Trinit. 15 Jacob. Lee and his wife against Wood Knight, Defendant.

In an Action of Debt upon a Bond of 100 l. made by the Defendant to the Plaintiff Elizabeth when she was sole, 7 Decemb. 13 Jacob. upon condition to pay 70 l. to the said Elizabeth the ninth of December, 1616.

The Defendant after Oyer of the condition said, that the 17 Febrna. 13 Jacob. the said Elizabeth by Indenture reciting, that whereas the Defendant, with John and William Wood his sons, were bound jointly and severally to the said Elizabeth in a Bond of 1400 l. 6 December, 13 Jacob. upon condition to pay 700 l. the eighth of October, 1616. and by an Obligation of 120 l. 7 Octob. 13 Jacob. on condition to pay 70 l. the ninth of December, 1616. and by five other several Obligations the seventh of December, 13 Jacob. every one of them of 100 l. upon several conditions to pay 35 l. the tenth of June, 1617. and 35 l. the ninth of December then next, and 35 l. the 10 of June, 1618. and 35 l. the ninth of December then next, and 35 l. the tenth of June, 1619. and 35 l. the ninth of December then next, and 35 l. the tenth of June, 1520. and 35 l. the ninth of December then next, and 35 l. the tenth of June, 1621. and 35 l. the ninth of December then next. The said Elizabeth did agree, covenant and grant with the said Defendant, that if the Defendant should pay to Elizabeth, the Daughter of the said Elizabeth the Plaintiff, 500 l. due to her by the Will of Edmund Pigot her Father, in full discharge of a Legacy or Portion given to her by the said Will; or should procure to Elizabeth the Plaintiff a sufficient discharge for the said 500 l. of the said Elizabeth Daughter of the said Elizabeth, and should provide and take course for fit maintenance for the said Elizabeth during her life, and at all times upon request should save harmless the said Elizabeth, and her Executors and Assigns, of and from the payment of the said 500 l. and also shall pay to Susan the Daughter of Elizabeth the first of May, 1621. if she shall then be living and not marryed, 400 l. if the same shall then be due by the said Will: and if the said Susan shall live until the first of May, 1623. and then shall be marryed, and her portion not payd, then if the Defendant shall pay to the said Susan the said 400 l. within six weeks after the said first of May, to such person to whom the said Elizabeth by the said Will ought to pay the same, and shall procure good and sufficient discharge to the said Elizabeth of the said sum, of and from all persons to whom the same shall be due, that then all the said Obligations shall be voyd, and delivered up to the Defendant, cancelled and made voyd. And the said Elizabeth did covenant, that until manifest default was made in the premisses, and the said Elizabeth shall be thereof damnified, and upon reasonable request no satisfaction shall be given to her, she will not take any advantage by reason of the said Obligation, nor will prosecute any Suit against the Defendant or any other bound in the said Obligation. And the Defendants said, that the Plaintiffs, nor any of them, was not damnified by reason of the said Obligation in the Declaration, or by reason of any of the said other Obligations; and did aver the said

ſaid Obligation in the Declaration, and the ſaid Obligation of 120 l. in the Indenture, to be all one; and that the ſaid ſeveral days of payment limited by the Indenture, nor any of them at the time of the Writ purchaſed, were incurred.

Upon which Plea the Plaintiffs demurred, and the Defendant did joyn.

And I conceive that Judgment ought to be given for the Plaintiffs, for the Plea is utterly inſufficient for divers cauſes. And yet I do agree, that although the Obligation be upon a condition, yet is the Indenture a Defeaſance thereof; ſo that it is ſufficient to the Defendant to perform the one or the other. But the Indenture is of two parts: 1. That if the Defendant ſhall pay to Elizabeth the daughter 500 l. and ſhall perform the other things mentioned in the Plea, that all the Obligations ſhall be voyd and delivered up. 2. The Plaintiff Elizabeth did covenant, that until the Defendant ſhould make default in the premiſſes, and ſhe ſhould be damnified, and upon requeſt no ſatisfaction given to her, ſhe ſhould not take any advantage of the Obligation, nor ſhall proſecute any Suit againſt the Defendant or any other bound in the ſaid Obligation.

And as to the firſt part, I do agree that this is a good defeaſance of the Obligation, but the laſt clauſe is onely a Covenant, and cannot be pleaded in bar of this Action brought upon this Obligation: as in the 21 H. 7. 30. John de Puletoes Caſe: The ſaid John and others were bound to T. who by Deed did grant to the ſaid John, that he ſhould be quite diſcharged of the duty, and if he be vexed or ſued, that the Bond ſhall be voyd, which Caſe is there very largely argued: but I conceive the better Opinion to be, that the Bond is diſcharged, becauſe that the words are in effect as the words in the firſt part of this Indenture, (ſcil.) That if ſuch act be made, the Obligation ſhall be voyd. But there Fineux ſaid, That if I grant to my Tenant for life, that he ſhall not be impeachable for waſte, he ſhall not plead this in Bar, but ſhall have an Action of Covenant thereupon. And Brudnell put this caſe, That if I grant to one againſt whom I have cauſe of Action, that I will not ſue him within a year, this is not any ſuſpenſion of the Action: Upon which caſe it is to be obſerved, that I may ſue, and the other is put to his Action of Covenant.

And the Plea is firſt inſufficient, becauſe he pleads that the Plaintiffs, nor any of them, were damnified by reaſon of the Bond in the Declaration, or by reaſon of any of the aforeſaid Writings obligatory in the ſaid Indenture ſpecified: but he does not anſwer to the damnification by reaſon of the 500 l. to be payd to Elizabeth the daughter, which is the principal matter to be done by the Defendant for the defeaſance, and in truth this Portion was due, and not payd before this Suit begun. 1.

The Defendant did aver, that the ſeveral days of payment limited by the Indenture are not incurred, and there is not any day limited for the payment of 500 l. and the truth was, that it is payable at the time of the marriage of Elizabeth the daughter, but this is not limited by the Indenture, nor any time for the payment thereof, and therefore this averment is not good. 2.

The Indenture of the Defeaſance is, if the Defendant ſhall pay the 500 l. or procure to the Plaintiff Elizabeth ſufficient diſcharge for the ſame, and ſhall provide fit maintenance for Elizabeth the daughter: Whereupon I conceive that the Defendant ought to pay 500 l. and 3.

provide

pꝛovide maintenance foꝛ the daughter, oꝛ otherwiſe that he ſhould pꝛocure a diſcharge from the Plaintiff Elizabeth, and ſhall alſo pꝛovide maintenance foꝛ the daughter, foꝛ her maintenance is as neceſſary, if the mony be payd, as it will be, if the diſcharge be pꝛocured. And the Defendant hath made no anſwer to the pꝛoviding of maintenance.

Judgment. And Michaelm. 15 Jacob. Judgment by all the Court was given foꝛ the Plaintiff.

Rot. 590.

Trinit. 16 Jacob. Margaret Evans againſt Wilkins.

IN an Action on the Caſe, foꝛ that the Plaintiff the 12 September, 15 Jacob. did retain the Defendant to be her Shepherd, &c. and that the Defendant in conſideration of 6 d. to him payd by the Plaintiff, and of 33 s. 4 d. of his Sallery to be payd to him foꝛ a year, and in conſideration that the Plaintiff did aſſume to pay the 33 s. 4 d. to the Defendant, and to finde him meat, dꝛink, and lodging foꝛ the ſaid year, and to permit the Defendant to have Paſture foꝛ twelve Sheep with the Sheep of the Plaintiff, Did aſſume to ſeꝛve the Plaintiff as a Shepherd foꝛ one year from Michaelmas next, &c. and to keep her Sheep: To which the Plaintiff giving credit, did not retain any other Shepherd: and the Plaintiff did aver, that ſhe was ready to pay the Defendant the ſaid 33 s. 4 d. and to pꝛovide him meat, &c. and to permit him to have Paſture foꝛ twelve Sheep with the Sheep of the Plaintiff: yet the Defendant did not feed the Sheep of the Plaintiff, although required the 4 Octob. 15 Jacob. whereby many of her Sheep dyed ad damnum 40 l.

The Defendant pleaded the Statute of the 5 Elizab. whereby it is enacted, That the Juſtices of Peace of every County, oꝛ the greater part of them then reſident in the County, and alſo the Sheriff if it may be, and every Major, Bayly, oꝛ other chief Officer of any City oꝛ Town Corporate, in which there ſhall be any Juſtice of Peace within the limits of the ſaid Town, before the tenth of June next coming and afteꝛwards, ſhall yeaꝛly at every general Seſſions fiꝛſt held and to be kept after Eaſter, oꝛ any convenient time after Eaſter, ſhall meet together, and after ſuch meeting ſhall call to their aſſiſtance ſuch diſcreet and gꝛave peꝛſons of the ſaid County oꝛ Town, and ſhall have authoꝛity within the ſaid Pꝛecincts of their ſeveral Commiſſions, to ꝛate the ſtipends of all Laboꝛeꝛs and Seꝛvants, &c. And that every ꝛetainment, pꝛomiſe, gift, oꝛ ſtipend againſt the intent of the ſaid Act, ſhall be voyd.

And he pleaded the Statute of the 39 Elizab. whereby it is enacted, That afteꝛ the Rates made and ingꝛoſſed in Paꝛchment unde the hands and ſeals of thoſe authoꝛized to make Rates, it ſhall be lawful foꝛ the Sheriff of the ſaid County, oꝛ the Major of any City oꝛ Town, to cauſe Pꝛoclamation to be made of the ſaid Rates in ſo many places as ſhall be convenient, &c.

And that afteꝛ the making of which Act, and befoꝛe the tenth of June in the ſaid Act ſpecified, (ſcil.) at the general Seſſions foꝛ the Peace, holden foꝛ the County of the City of Gloceſter, holden at the ſaid City on Monday next afteꝛ Eaſter, 15 Jacob. befoꝛe M. P. Maꝛoꝛ of the ſaid City, Toby Bullock and Anthony Robinſon Sheriffs of the ſaid City, and John Jones, and many other Juſtices of Peace; it was aſſigned, oꝛdained, and ratified by them, with the aſſent of divers other diſcreet

and

and grave perſons called to them, That every Shepherd, having care of fourty Sheep and above, ſhould take for his ſtipend, with his meat and drink, in mony *per annum* 3 l. and no more. And ſaid, that the rate for the ſaid ſtipend was made and ingroſſed in Parchment under the hands and ſeals of the Major, Sheriffs, and Juſtices aforeſaid; and that proclamation was made of the ſaid Rate within the ſaid City, before the ſaid promiſe and agreement; and that the ſtipend agreed to be payd by the Plaintiff, did exceed the rate of 3 l. for a year: and ſo he ſaid, that his ſaid promiſe was voyd in Law. Whereupon the Plaintiff demurred in Law.

And I conceive that Judgment ought to be given for the Plaintiff, for the Plea is utterly inſufficient for divers cauſes.

It is not averred, that the Juſtices who did rate the wages, were the greater part of the Juſtices then reſident within the County, and that is an authority given to them by the Statute, which repoſeth this truſt in all the Juſtices, or at leaſt in the greater part of them, and therefore this authority ought to be purſued, and becauſe it is not, all that they did is voyd. 1.

The Plea is repugnant in it ſelf, for the rate is alledged to be made after the making of the Statute, and before the tenth of June in the ſame Act ſpecified, (ſcil.) at the Seſſions the 15 Jacob. which is impoſſible to be ſo: for the tenth day of June in the Act was the fifth year of Elizabeth; and therefore there is a manifeſt repugnancy: as in 21 H. 7. 34. One was indicted of Felony done the tenth of May, and another was indicted for that he did ſuffer him to eſcape the firſt of May, wherefore he was diſcharged. 2.

The Juſtices ought to call to them ſome grave men of the County or City, and it is not alledged here that they were of the County, and without them they cannot make any Rate: for the Statute ordains, 1. That they ſhall call ſuch to them: 2. That they ſhall confer together; and conſider of the plenty and ſcarcity, and other circumſtances neceſſary to be conſidered. 8 H. 7. 13. The Statute of the third of H. 7. doth appoint, that the Chancellor, Treaſurer, and Privy Seal, or two of them, ſhall call to them one Lord Spiritual and another Temporal of the Kings Councel, may examine maintenance, &c. now by this none are Judges but the ſaid three, and the other but aſſiſtants: and ſo is upon the Statute of 31 Edw. 1. 12. of Error in the Exchequer Chamber: But agreed that it is Error, if the Chancellor does not call the other to aſſiſt, and to act with their advisement, becauſe the Statute doth ſo limit it: and the 14 Ed. 4. 1. which ſays, That the Chancellor, calling to him the Juſtices of the one Bench or the other, hath power to award a Subpœna againſt ſuch perſon, &c. and the Chancellor himſelf did award a Subpœna, and adjudged not good. And ſo the Statute of Merton, cap. the 3d. of Redisſeiſin, which ordains, that the Sheriff, taking with him the Coroners and other lawful people, ſhall go to the place, and there enquire, &c. 23 Aſſiſ. 7. If he goes with a Coroner onely where there are more, it is not good; and the ſame Law is, if he take not others with him: according to the 25 Ed. 3. 57. 3.

The Rate is onely for a Shepherd having care of fourty Sheep and above, and does not alledg that the Defendant had keeping of fourty Sheep and above: ſo that it may be he had but twenty or thirty, and then there is no rate for ſuch wages. 4.

It is alledged that the Rates were ingroſſed in Parchment accor- 5.

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ing to the Statute, but there is no place alledged, and therefore it is iſſuable.

Judgment. And after, ſcil. Hillar. 16 Jacob. Judgment was given for the Plaintiff by all the Court.

Trinit. 14 Jacob. The King and Richard Parker againſt Sir John Webb and Katherin his wife.

RIchard Parker, as well for the King as himſelf, did inform againſt Sir John Webb and Katherin his wife, the which Katherin the 18 of May, 13 Jacob. was eighteen years of age and above, and was wife of the ſaid Sir John; the which ſaid Katherin the ſaid 18 of May, and always after until now, being an Inhabitant at North-Charford in the County of Southampton from the ſaid 18 of May until the 18 of May, 14 Jacob. viz. for the ſpace of twelve months, did not come to the aforeſaid Parith Church, nor to any other Church, Chappel, or uſual place of Common Prayer, and did not there remain at the time of Common Prayer and Divine Service, but for all the ſaid time did voluntarily and obſtinately, without any reaſonable cauſe, abſtain from the ſame, contrary to the form of the Statute, whereby an Action accrued to the King and the Informer, to have of the ſaid Sir John and Katherin 240 l. (ſcil.) 20 l. for every month, &c. whereof the Informer prays a moyety, &c.

The Defendants ſaid, that the ſaid Statute was made the 16 of Jan. 23 of Elizab. and that after the making thereof, viz. in the Parliament held the 29 Octob. 28 Elizab. it was enacted, That every Defendant, in not repairing to Divine Service contrary to the Statute of the 23 of Elizab. who thereupon ſhall happen to be convicted, ſhall pay into the receit of the Exchequer according to the rate of 20 l. for every month, which ſhall be contained in the Indictment whereupon ſuch conviction was had, and alſo for every month after ſuch conviction, without any other Indictment or Condiction, ſhall pay into the ſaid Exchequer, at Eaſter and Michaelmas, ſo much as ſhall then remain unpayd, according to the rate of 50 l. for every month after ſuch conviction: and if default ſhall be made in any ſuch payment, that the Queen may by Proces out of the Exchequer, take, ſeiſe, and enjoy all the goods, and two parts as well of the Lands, Tenements, and Hereditaments, Leaſes and Farms of ſuch Offendor, as of all other Lands, Tenements, and Hereditaments liable to ſuch ſeiſures or penalties, leaving a third part onely of the ſaid Lands, Leaſes and Farms, for the relief of ſuch Offendor, his Wife, Children, and Family. And, for the more ſpeedy conviction of ſuch Offendors, it was enacted, That upon the Indictment of ſuch Offendor, proclamation ſhall be made at the Aſſiſes, or Gaol-delivery, where ſuch Indictment ſhall be made, whereby it ſhall be commanded that the body of ſuch Offendor ſhall be rendered to the Sheriff of the ſame County before the next Aſſiſes and Gaol-delivery, and if ſuch Offender does not appear at the ſaid next Aſſiſes and Gaol-delivery, that then upon ſuch default recorded, the ſame ſhall be ſufficient conviction of ſuch Offendor, as if a Tryal by Verdict had been had and recorded.

And the Defendants further ſaid, that the 19 of March, the firſt of King James, the Juſtices of Aſſiſe and Gaol-delivery at the Aſſiſes, and the Juſtices of Peace at the Quarter Seſſions, have authority to

enquire

enquire and determine of all Recuſants, as well for not receiving the Communion, as for not repairing to Church according to the form of the Lawes, in ſuch manner and form as the Juſtices of Aſſiſes and Gaol-delivery may do, and alſo ſhall have power to make proclamation whereby a Precept ſhall be had for the rendring the body of the Offender to the Sheriff, before the next Aſſiſes or Gaol-delivery, or the next quarter Seſſions, &c.

And they ſaid, that before the Information, viz. at the Aſſiſes and Gaol-delivery held at Weſtminſter, 8. Auguſt 12 Jac. before Sir Henry Hobard chief Juſtice of the Bench, and Sir Laurence Tanfeild chief Baron of the Exchequer, Juſtices of Aſſiſe and Gaol-delivery in the County of Southampton, the ſaid Katherine (by the Oath of Robert Pawlet Eſquire, &c. ſcil. nineteen in all) which were ſworn and charged to enquire for the King and the body of the County) was indicted, for that the ſaid Katherine the firſt of April, 11 Jac. was of fifteen years of age, and did not repair to the Parish Church of Porthchalford, nor to any other Church, Chappell, or uſuall place of Common Prayer, and was there at the Common Prayer and Divine Service, at any time within one month next enſuing the ſaid firſt of April, 11 Jac. but did abſtain from the ſame from the ſaid firſt of April for a month, contrary to the form of divers Statutes, &c. upon which Indictment at the ſaid Aſſiſes and Gaol-delivery, publick Proclamation was made that the ſaid Katherine ſhould render her body at the next Aſſiſes and Gaol-delivery, to render to the King according to the Statute, &c. at which next Aſſiſes and Gaol-delivery, the ſixth of March, 12 Jac. before the ſaid Juſtices the ſaid Katherine did not render her body according to the ſaid Proclamation, nor appear upon Record, whereupon the ſaid Katherine of the Premiſſes whereof ſhe was indicted, was lawfully convicted, and yet ſtands convicted according to the Statute: And the Defendants further ſaid, that they the aforeſaid Term of Eaſter next after the conviction aforeſaid, the ſaid Katherine did not pay, nor any of them did pay into the Exchequer, according to the rate of twenty pounds for every week contained in the ſaid Indictment, nor did after the conviction in the ſaid Exchequer, ſo much as then did remain not payd, according to the rate of twenty pounds for every month after ſuch conviction, but thereof made default, which conviction afterwards, viz. in the Term of S. Michael then next after the conviction as aforeſaid, by the ſaid Sir Henry Hubbert and Laurence Tanfeild, Juſtices, &c. was extreated and certified into the Exchequer, and ſo there did remain according to the form of the Statute, &c. and the ſaid conviction yet does remain in full force, and this they are ready to aver, with that alſo that the ſaid Katherine named in the Information, and the ſaid Katherine named in the Indictment, are one and the ſame perſon.

Upon which Plea Mr. Attorney demurred in Law, and the Defendants did joyn.

And I conceive that Judgment ought to be given for the King, and the Informer againſt the Defendants.

In which, firſt it is to be conſidered, that neither the Statute of 28 Eliz. nor the Statute 35 Eliz. which give ſeverall remedies to the King for the monthly forfeiture of twenty pounds given by the 23 Eliz. doe not reſtrain the Informer, but that notwithſtanding thoſe Statutes, any one may informe againſt any Recuſant, for not repairing to Church, againſt the Statute of 23 Eliz. unleſſe the King hath firſt taken his remedie againſt him for the ſame offence, for that was adjudged

judged by all the Court in Dr. Fosters Caſe, 11 Rep. And as I believe this will be granted and by the Defendants Councell, ſo I will agree with them, that if the Recuſant be once convicted, and puniſht at the ſuit of the King, he ſhall not be puniſht for the ſame offence again, at the ſuit of the Informer, or otherwiſe, for it is unjuſt to puniſh an Offender twice for one Crime.

And therefore the chief matter to be conſidered in this Caſe, is the nature and force of this conviction againſt the wife, and whether it be ſuch a conviction as will bar the Informer of his Information, or not.

And as to that, firſt, the woman is indicted here of Recuſancy, and proclaimed according to the Statute of 28 Eliz. and ſhe did not render her body whereby ſhe is convicted by this Statute, but this conviction is not any Judgment, for the true words of the Statute are, That if the party indicted ſhall not appear, but make default after ſuch Proclamation, that then upon ſuch default recorded, this ſhall be a ſufficient conviction in Law of ſuch Offender, as if a Tryall by Verdict had been had and recorded, ſo that ſuch default of appearance is made equivalent to a Verdict by that Statute, but not to a Judgment, ſo that now it is to be underſtood, that the woman in this Caſe is convicted by Verdict of Recuſancy, but no Judgment is given. And I conceive that ſuch conviction is no Bar to the Informer.

For that this is a fruitleſſe conviction and ſuch a one, as the King can take no advantage of, and every conviction that ſhall make a diſcharge to the perſon convicted, ought to be a legall and abſolute conviction, and ſuch a one as thereby the party convicted may ſuffer the penalty impoſed by the Law for ſuch offence.

And that the King can have no benefit of this conviction is apparent, for the remedy given to him by the 28 Eliz. for the penalty is to ſeiſe all the Goods, and two parts of the Lands and Leaſes of the Recuſant, but the woman here being married hath no Lands or Goods, and therefore the King cannot have any thing, and the Goods or Lands of her Huſband cannot be taken for his wifes offence, ſhe being convicted by Indictment only, to which the husband is no party.

Object. But it may be objected that the wife may perhaps ſurvive the husband, and then ſhe may have Goods and Lands, and the King may ſeiſe them.

Anſwer. I anſwer, that firſt, it may be alſo that the husband may ſurvive, and then the King ſhall never have any thing, as it is reſolved in Dr. Fosters Caſe. 2. This Objection is upon two poſſibilities; 1. That the husband may firſt dye. 2. That the wife then ſhall have Lands and Goods: And I have always taken it for a Rule, that a poſſibility ſhall never take away a preſent Action or Suit as is proved by divers Caſes, as in 5. Rep. Harriſons Caſe, and 9. Rep. fol. 108, 109.

And as it is ſaid in Elmers Caſe 5. Rep. that two poſſibilities cannot maintain hoſpitality or repair a Church, ſo I ſay in this caſe, that one ſuch poſſibility to recover this penalty for the King, cannot hinder the Informer of his Suit, nor oppoſe the good reformation of Recuſants intended by the Statute, for then all married women addicted to Popery will be Recuſants upon confidence, that if they be once convicted by Indictment (the which they themſelves may procure to be done) then they ſhall not be ſubject to any penalty during the lives of their husbands, who peradventure may ſurvive them, and as it was well obſerved in Dr. Fosters Caſe, that married women are the moſt

dangerous

dangerous Recuſants, becauſe that they have the education of their Children and the goverment of their Servants.

But it may be objected, that if the Informer may ſue and recover againſt the husband and wife, then if the wife does ſurvive, the King ſhall have theſe Lands, and goods according to the 28 Eliz. or may ſue the husband and wife, according to the 35 Eliz. for theſe penalties, and ſo ſhall be two waies puniſhed for the ſame offence. Object.

No ſuch inconvenience can happen, for as it is reſolved in Dr. Fosters Caſe, the recovery of the Informer being legall ſhall bar the King, as in the 19 Ed. 2. where the Teſtator was bound in a Recognizance for performing of Covenants, this was no bar in debt upon an Obligation, but that the Plaintiff may recover, and if after ſuch recovery the Statute be forfeited, and execution thereupon, the Executor ſhall have an Audita Querela, for that he had lawfully adminiſtred the goods before for payment of the Bonds. Anſwer.

And after, viz. Mich. 17 Jac. I moved the Court that the Plea of the Defendants was inſufficient, for that the Statute did ordain that upon every Indictment of Recuſancy, proclamation ſhould be made, and that the body of the Offender ſhould be rendred to the Sheriff of the County before the next Aſſiſes or Gaol-delivery, and if ſuch Offender ſo proclaimed, does not appear but makes default, that he ſhall be convicted, &c. And the Defendants have pleaded, that Proclamation was made, that the body of the ſaid Katherine ſhould be rendred at the next Aſſiſes or Gaol-delivery, &c. and therefore ſhe is not convict at all, becauſe ſhe was not proclaimed according to the Statute for this Proclamation differs in two materiall circumſtances from the form preſcribed by the Statute; firſt, in omiſſion of the Sheriff to whom the body is to be rendred. 2. In the time for the Statute limits it to be done before the next Aſſiſes, &c. but this Proclamation gives a larger time (ſcil.) at the Aſſiſes.

Whereupon all the Court agreed that the Plea was inſufficient for the cauſes aforeſaid, and that now the wife was not convicted by proclamation.

Wherefore Judgment was given for the King and the Informer. Judgment.

John Mitton Adminiſtrator of George Mitton, of Goods not Adminiſtred by Alice Mitton, againſt John By.

IN an Action of Debt for twenty five pounds, for that *William* Marqueſs of *Wincheſter*, the twentieth of *October*, 30 *Eliz.* by Indenture did deviſe to *John By* the Father of the Defendant, three parts of the Mannor of *Newnham* in the County of *Southampton*, excepting all Fines, Reliefs, Amerciaments, Courts, Woods, Copies, Fiſhings, and Royalties. *Habendum* from *Michaelmas* next for one and twenty years, rendring ſix ſhillings ten pence Rent, at the Annunciation, and *Michaelmas*.

The twentieth of *January* 1. *Jac. John By* the Father made his Will, and made the Defendant his Executor and died poſſeſſed.

The fourteenth of *Novemb.* 2 *Jacob.* the Defendant granted the Term to the Inteſtate.

The ſixteenth of *Novemb.* 2 *Jac.* The Inteſtate did grant all the Term by Indenture to the Defendant, rendring fifty nine pounds Rent at the

Annunciation and *Michaelmas*, whereby he entred and had poſſeſſion of the Land: and twenty five pounds of the ſaid Rent for half a year ending at *Michaelmas*, 15 *Jacob.* was behinde to the Plaintiff after the death of the Inteſtate, which yet the Defendant doth not pay, *ad damnum, &c.*

The Defendant ſays, that the Inteſtate the twenty ſixth of *June*, 5 *Jac.* did releaſe by Deed to the Defendant, all Actions, Suits, Debts, Duties, from the begining of the world until the day of the date of the ſaid writing.

Whereupon the Plaintiff demurred in Law.

And I conceive that Judgment ought to be given againſt the Plaintiff.

For that in *Littleton* 118. If one doth releaſe to another all Demands, this is the beſt Releaſe that may be, and ſhall enure to the moſt advantage of him to whom it is made: For by ſuch Releaſe, all Actions, Reals and Perſonals, and Appeals and Executions, are gone and extinct: and if a man hath title to enter into any Land, by ſuch Releaſe his title is gone: and 20 *Aſſiſ.* 5. where in an Aſſiſe for Rent, a Releaſe of all Demands was pleaded, and the common Opinion was, that it was good; wherefore the Plaintiff was non-ſuited: and 5 *Edw.* 4. 42. by *Danby*: A Releaſe of all Demands by a Lord to his Tenant is a good bar and extinguiſhment of his Seigniory; for although no Rent was behinde at the making of the Releaſe, yet is the Rent always in Demand: and 6 *H.* 7. 15. If the King releaſeth all Demands, yet as to him the Inheritance ſhall not be included: But in caſe of Rent or right of Entry by a common perſon, and every thing therein implyed, is gone by ſuch Releaſe: And 14 *H.* 8. 9. by *Pollard*: By Releaſe of all Demands the Rent is extinct, for Rent is to be had by Demand; and if one doth determine the means he hath to come by a thing, he doth determine the thing it ſelf: And *Litt.* 118. If a man hath a Rent-ſervice, or Rent-charge, or Common of Paſture, by ſuch Releaſe of all Demands, all is gone from the Land from whence the Service or Rent is iſſuing, or the Common of Paſture: But if one lets Land to another for a year, rendering forty ſhillings Rent at *Michaelmas*, and before the Feaſt does releaſe to the Leſſee all Actions, yet after the Feaſt he ſhall have an Action of Debt for non-payment of the forty ſhillings notwithſtanding the Releaſe. And 40 of *Ed.* 3. 48. *Hillary*: By ſuch Releaſe to the Conuſor of a Statute-Merchant before the day of payment, the Conuſee ſhall be barred of his Action, becauſe that the Duty is always in demand: yet if he releaſe all his right in the Land, it is no Bar: 25 *Aſſiſ.* 7. And *Althams* Caſe, *Cokes Rep.* 153. By a Releaſe of all Demands, not onely all Demands, but alſo all cauſes of Demands are releaſed. And there are two manners of Demands, *viz.* In Deed, and in Law. In Deed: As in every *Præcipe quod reddat*, there is an expreſs Demand. In Law: As in every Entry in Land, Diſtreſs for Rent, taking and ſeiſing of goods, and the like acts in *Pais*, which may be done without words, are Demands in Law. And as a Releaſe of Suits is more large and beneficial then a Releaſe of Complaints or Actions, ſo a Releaſe of Demands is more large and beneficial then any of them, for by that is releaſed all thoſe things that by the others are releaſed, and more; for thereby all Freeholds and Inheritances are releaſed: as in 34 *H.* 8. *Releaſes* 90. 6. He who does releaſe all Demands, does exclude himſelf of all Entries, Actions, and Seiſures: And *Littl.* 170. By the Releaſe of all Demands Warranty is releaſed, and yet that is Executory, and the reaſon hereof is, that by the Releaſe of Demands,

mands, all the means, remedies, and cauſes, that any hath to Lands, Tenements, Goods or Chattels, are extinct, and by conſequence the right and intereſt in all of them. And in 40 *Ed.* 3. 22. It is debated there, whether a Releaſe of all Demands by the Lord to the Tenant, to hold onely by Rent and Fealty, ſhall bar the Lord to demand reaſonable ayd to marry his Daughter; but it was agreed there, that ſuch Releaſe ſhall bar the Lord of his Rent, for as it is there ſaid, that is always in demand. And 13 *R.* 2. *Avowry* 89. One gives Land in Tayl to hold by Rent, Homage and Fealty for all Services and Demands, this does diſcharge the Tenant of Relief, (but 18 *Ed.* 3. 26. *contrarium tenetur.*) And 7 *Ed.* 2. *Avowry* 211. Suit at a Leet by reaſon of Reſidency is not diſcharged by a Feoffment to hold by Rent for all Services and Demands, for this ſervice is not in reſpect of the Land, but of reſidency of the perſon. And 14 *H.* 4. 2. *Gilbert de Clare*, Earl of *Gloceſter*, before the Statute of *Quia Emptores Terrarum*, did give Land, parcel of the Honor of *Gloceſter*, to hold of him as of the Honor, to hold by Homage, Fealty and Rent for all Services and Demands: And after long argument it was agreed, and hereby the Lord was excluded to have a Fine for alienation, which otherwiſe was due from every Tenant of the Honor. And as the Fine was diſcharged there by the Feoffment, ſo it might have been by Releaſe of all Demands.

And the whole Court agreed, that by this Releaſe of all Demands the Rent is releaſed, and ſo the Plaintiff ought to be barred: and ſo *Paſch.* 16 *Jacob.* Judgment was given accordingly. Judicium.

Hillar. 13 Jacob. Southern againſt How.

IN an Action on the Caſe, for that the Defendant the firſt of April, 5 Jacob. was poſſeſt de quibuſdam Jocalibus artificialibus & contrefectis, (*Anglice*) artificial and counterfeit Jewels, viz. two Carcanets, one pair of Ear-rings, one pair of Pendants, and one Cojonet, as of his proper goods: and the Defendant there and then knowing the ſaid Jewels to be artificial and counterfeit, and fraudulently intending to ſell them for true and perfect Jewels, there and then did deliver them to one William Sadock his ſervant, to whom at that time the ſaid Jewels were known to be counterfeit and artificial, and did command the ſaid William to tranſport the ſaid Jewels beyond the Seas into Barbary, where the Defendant well knew that the Plaintiff was reſiding: and did further command the ſaid William, that he ſhould conceal the counterfeitneſs and falſneſs of the ſaid Jewels, and that after his arrival he ſhould repair to the Plaintiff, and ſhew him the ſaid Jewels for good and true Jewels, and there require the Plaintiff to ſell the ſaid Jewels for good and true Jewels for the Defendant, to the King of Barbary, or to any other that would buy them, and that he ſhould receive a price for them as if they were good and true Jewels.

That the 20 of April, 5 Jacob. the ſaid William did ſail from London to Barbary, and there the 22 June, 5 Jacob. arrived, and did then repair to the Plaintiff; and knowing the ſaid Jewels to be artificial and counterfeit, did ſhew them to the Plaintiff for good and true Jewels, and there and then did require the Plaintiff to ſell them for good and true Jewels to Mully Sydan then King of Barbary, and there & then did affirm to the Plaintiff, that the ſaid Jewels were worth in value 14400 Dunces of Barbary Mony, amounting to 810 l. of Engliſh Mony. And

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the Plaintiff not ſuſpecting the ſaid Jewels to be counterfeit, but conceiving them to be good and true, did receive them of the ſaid William, and afterwards (ſcil.) the 22 of Auguſt, 5 Jacob. did offer them to the ſaid King of Barbary as good and true Jewels, and there and then did procure the ſaid King to buy the ſaid Jewels (not being of the value of 3000 Ounces of Barbary Mony, amounting to 1681. 15 s. Engliſh) for 14400 Ounces of Barbary Mony, amounting to 810 l. which mony the Plaintiff the 22 of Auguſt, 5 Jacob. received of the ſaid King for the ſaid Jewels for the Defendant, and did pay the ſaid ſum then there to the ſaid William for the Defendant; and the ſaid William, immediately after the receit thereof, did ſecretly withdraw himſelf out of Barbary, and did return into England to the Defendant with the ſaid ſum, and the firſt of October, 5 Jacob. did pay the ſame to the Defendant.

That the 30 of May, 6 Jac. the ſaid King perceiving the ſaid Jewels to be counterfeit, cauſed the Plaintiff to be arreſted and impriſoned for them, and retained him in priſon three months, and until the Plaintiff out of his proper goods did repay to the ſaid King the ſaid 14400 Ounces of Barbary Mony.

That the firſt of October, 6 Jac. the Plaintiff gave notice to the Defendant of the repair of the ſaid William to him, and of all the premiſſes, and requeſted him to pay to the Plaintiff the ſaid ſum, which yet he hath not payd, ad damnum 2000 Marks.

The Defendant pleaded Not guilty.

The Jury found that the firſt of April, 5 Jac. the Defendant was poſſeſt of the ſaid Jewels, and knowing them to be artificial and counterfeit, and intending fraudulently, for good and true Jewels did deliver them to the ſaid William Sadock, and that it was then well known to the ſaid William that the ſaid Jewels were artificial and counterfeit, and that the Defendant did command the ſaid William that he ſhould tranſport the ſaid Jewels into Barbary, where he knew the Plaintiff did reſide; and did further give authority to the ſaid William to ſell the ſaid Jewels to the then King of Barbary, or to any other perſon that would buy them. And the Jury found that the ſaid William went into Barbary, and there, knowing the ſaid Jewels to be artificial and counterfeit, did ſhew them to the Plaintiff for good and true Jewels, and did requeſt the Plaintiff to ſell and utter them to the ſaid Mully Sydan for good and right Jewels for the Defendant, affirming to the Plaintiff that the ſaid Jewels were worth 14400 Ounces of Barbary Mony, amounting to 810 l. Engliſh Mony, and that the Plaintiff not ſuſpecting the ſaid Jewels to be artificial and counterfeit, but conceiving them to be good and true Jewels, did receive them of the ſaid William, and preſented them to be ſold to the ſaid King as good and true Jewels, and procured the ſaid King to buy them (not being of the value of 3000 Ounces of Barbary Mony, amounting to 1681. 15 s. of Engliſh Mony) for 14400 Ounces of Barbary Mony, amounting to 810 l. Engliſh Mony; and the Plaintiff then and there did receive the ſaid ſum of the ſaid King for the ſaid Jewels for the Defendant, and payd the ſame to the ſaid William, who after the receit thereof immediately conveyed himſelf out of Barbary to London, and did there pay the ſaid ſum to the Defendant: and that afterwards the ſaid King perceiving the ſaid Jewels to be artificial and counterfeit, cauſed the Plaintiff to be arreſted and impriſoned, and detained him in priſon three months, until he had repayd to the ſaid King the ſaid 14400 Ounces of Barbary Mony

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for the said Jewels, and that the Plaintiff did give notice to the Defendant of all the said premisses, and requested him to repay him the said sum as the Plaintiff had alledged. But they said, that the Defendant did not command the said William that he should conceal the gravity or counterfeiting of the said Jewels, or that he should repair to the Plaintiff and shew him the said Jewels for good and true Jewel, and to require the Plaintiff to sell or utter the said Jewels to the said King, or other person that would buy them: and that he received the price for them as for good and true Jewels, as by the Declaration is supposed.

And if it seem to the Court upon the whole matter, that the Defendant is guilty, they found for the Plaintiff, and did assign 642 l. damages, and four Marks costs; and if not, then they found for the Defendant.

And I conceive that Judgment ought to be given against the Plaintiff, and that this Action does not lie against the Defendant, for four Reasons.

It does appear by the Plaintiffs own Declaration that these Jewels were not counterfeit, but onely of a less value then the mony for which they were sold: for although the plaintiff in his declaration termeth them to be counterfeit Jewels, yet he acknowledgeth them to be worth 168 l. 15 s. or as near that value as may be; for in as much as he averres them, not to be of the value of 168 l. 15 s. this being his own averment, it shall be taken most strongly against himself (scil.) that they were very near that value; and if they were of that value, it appears to the Court that they could not be counterfeit, although they were not of so great value as was payd for them: And the value and estimation of Jewels is always as the Buyer will account of them and esteem them: as Michaelm. 38 and 39 Elizab. Common Bench: where Davenport brought an Action on the Case against Sympson, wherein the Plaintiff declared, that he was possest of an Ewer of silver to the value of 500 l. and did give the same to A. to transport beyond Sea, and to sell the same there, and to give an account thereof to him, and that A. had broken it, and converted it to his own use: whereupon the now Plaintiff brought his Action on the Case against A. ad damnum 500 l. whereupon they were at issue, and the Defendant did maliciously depose, that it was worth but 180 l. whereupon the Jury gave but 200 l. damages: And adjudged that the Action would not lie, and chiefly because that the value of such things are so uncertain, that some value them higher then others. 1.

Also the Verdict doth vary from the Declaration in three material points: 1. The Defendant doth not direct his Servant to the Plaintiff. 2. The Defendant did not command him to conceal the counterfeitness of the Jewels. 3. He did not command the Servant to sell them as good Jewels.

No Action on the Case lies, although this fact had been done by the Defendant himself: as 11 Ed. 4. 6. If one sells Clothes, and doth warrant them to be so long, and they are not, an Action on the Case lies; but there ought to be an express warranty, and that ought to be made at the time of the sale, or else no Action lies. And F. N. B. 94 C. If one doth sell a Horse, and warrant him to be sound, and he is not, an Action lies: so if one sells corrupt Wine, and warrants it to be good, an Action lies: but unless he warrant the Horse or Wine to be good, no Action lies; for the Buyer is at his peril, and his eyes and his taste 2.

must

must be his judges in this case: and in 7 H. 4. 14. The Plaintiff declared, that the Defendant sold corrupted Wine to him, knowing the same to be corrupted: the Defendant said, that he gave the Plaintiff a taste of the Wine, and that he agreed that it was good Wine, and adjudged the Action would not lie: and 13 H. 4. 1. If one sells a Horse that is blinde, and warrants him to be sound, no Action lies, because I may see whether he be blinde or not; but otherwise, where he hath a disease in his body, which I cannot discern.

Montague. He ought to have shewed that he was legally imprisoned, and compelled to pay the Pony, for otherwise he cannot have an Action; as in 13 H. 4. 6. A diversity in sale of things between those things that are necessary, and not necessary, as Jewels: also the said William was authorized by the Defendant to sell the Jewels, and he cannot authorize another; and therefore that which the Plaintiff hath done, was without any warrant from the Defendant.

3. The Defendant did not require his Servant to conceal the counterfeitness of the said Jewels, nor to request the Plaintiff to sell them, and therefore all that the Servant did to the Plaintiff was of his own voluntary act, for which he must answer, and not his Master; for a Master shall answer for no acts of his Servant but those which he does by his commandment: as 9 H. 6. 53. by Rolphe: If I have a Servant who is my Merchant, and he goes to the Fair with an unsound Horse, or other Merchandize, and sells them, the Vendee can have no Action against me. Martin. You say true, for you do not command him to sell the Horse to him, nor to no other person in certain. Vide Doctor and Student 138.

4. It does not appear, that the Plaintiff was lawfully indemnified, for it is onely alledged and found, that he was imprisoned by the King until, &c. but it is not alledged or found, that this was done by a legal course, or according to the Law of that Country, but onely by the absolute power of that King, and therefore the Plaintiff can have no remedy, although there had been a Warranty: as Cook. 5 Rep. Noke and Anders Case: If Lessee for years be outed by a stranger without title, he shall not have an Action of Covenant.

And this Case was argued by Crook for the Plaintiff, and by me for the Defendant, 29 Janua. 15 Jacob. at which time the Court seemed to incline against the Plaintiff: And Trinit. 16 Jacob. The case was argued by Davenport for the Plaintiff, and by Coventry the Kings Solicitor for the Defendant, at which time Montague, Doderidge, and Haughton agreed, that the Action would not lie, and Crook was absent.

Judgment. And afterwards, Michaelm. 16 Jac. Judgment was given by all the Court: Quod querens nihil capiat per Billam.

Trinit. 15 Jacob. Lingen against Payn.

IN an Action of Debt upon a Bond of 400 l. made the third of October, 12 Jacob. and the Defendant demanded Oyer of the Obligation, and of the Condition; which was, That whereas the Plaintiff had devised to Robert Hawkins the Farm of Williamthorp in the County of Glocester, until the Feast of St. Michael the Archangel next, if the said Robert, upon the said Feast day, or any time after, upon request made by the Plaintiff, his Heirs, or Assigns, should deliver the possession

poſſeſſion of the ſaid Farm to the ſaid Plaintiff, his Heirs or Aſſigns, and permit the ſaid Plaintiff, his Heirs or Aſſigns, to have and enjoy the ſame after ſuch requeſt; and alſo if the ſaid Robert in the mean time ſhall not give nor ſell any Wood, nor commit any waſte in the ſaid Farm, that then the Obligation ſhould be voyd.

The Defendant ſaid, that the Plaintiff, or his Aſſigns, upon the ſaid Feaſt, or at any time after, and before the Bill, did not require the ſaid Robert to deliver to the Plaintiff the poſſeſſion of the ſaid Farm, and that the ſaid Robert, from the time of the making of the ſaid Bond, unto the ſaid Feaſt, did not give or ſell any Wood, nor make any waſte upon the premiſſes. Bar.

That the 13 of June, 12 Jacob. the ſaid Robert being poſſeſt of the ſaid Farm, and the Plaintiff being ſeiſed in Fee of the Reverſion of the ſaid Farm; the Plaintiff, together with John Welford, by Indenture made at W. between the Plaintiff and the ſaid John Welford of the one part, and Richard Powle and Henry Powle of the other part, and inrolled in this Court within ſix weeks, for 1700 l. payd to the Plaintiff, did bargain and ſell to the ſaid Richard and Henry Powle the Reverſion of the ſaid Farm, habendum to them and their Heirs: And the 30 of Septemb. 13 Jacob. being the next day after the ſaid Feaſt, the ſaid Richard and Henry Powle, as the Aſſigns of the ſaid Plaintiff, at the ſaid Farm in W. aforeſaid, did requeſt the ſaid Robert to deliver the poſſeſſion of the ſaid Farm to the ſaid Richard and Henry, which he did refuſe. Replication.

That the ſaid Richard and Henry Powle did not require the ſaid Robert to deliver to them the poſſeſſion of the ſaid Farm the ſaid 30 of September, the 13 Jac. upon which they were at iſſue. Rejoynder.

The Jury found the poſſeſſion of the ſaid Robert Hawkins, and the ſeiſin of the Plaintiff, and the bargain and ſale, and that Henry Powle, 31 Septemb. 13 Jac. did alone come to the capital Meſſuage of the ſaid Farm, without any notice given before of his coming to the ſaid Houſe, and there then, as Aſſignee of the Plaintiff, did require the ſaid Robert Hawkins to deliver the poſſeſſion of the ſaid Farm according to the effect of the condition aforeſaid, and that the poſſeſſion of the ſaid Farm was not delivered according to the tenor of the ſaid writing; but the poſſeſſion of the ſaid Farm was kept from the ſaid Richard and Henry Powle. And if it ſeems to the Court upon this matter, that the ſaid Richard and Henry did require the ſaid Robert to deliver to them the poſſeſſion of the ſaid Farm, then they found it ſo, and did aſſeſs coſts and damages: and if not, they found for the Defendant.

And I conceive that Judgment ought to be given for the Plaintiff.

For in Tookers Caſe, 2 Report, by Popham: Every act made by one Joynt-tenant for the benefit of him and his companion, ſhall binde the other, as payment by one diſcharges the other; and one may prejudice the other in the profits: as where a Ward does happen to two Joyn-tenants, and one diſtrains for the ſervices which is a waver of the Wardſhip, by 1 Ed. 3. this ſhall binde the other.

And if two Joynt-tenants be diſſeiſed, and one enters, this is in Law the entry of both, and ſo it ſhall be pleaded; for when an act is made by one, the Law ſhall adjudg this to be made by him in whoſe right it is made: as in 32 Ed. 3. Bar 264. If one be bound to infeoff another ſuch a day, if he be ready by his Attorny to do it, it is ſufficient, for the Law takes the act of the Attorny to be the act of the party:

and ſo in the 19 H. 6. 78. to continue an Action: and ſo in 10 Edw. 2. Dower 130. and 9 Ed. 3. 38. If there be two Joynt-tenants in Fee, and one ſeiſed in right of his Wife, of Land to which the Wife hath title of Dower, the one Joynt-tenant or the Husband may aſſign the Dower; and the reaſon is given, becauſe that when the Husband or one Joynt-tenant does any thing out of Court that they are compellable to make, it ſhall be intended to be the Deed of the one and the other.

And ſo, if a Lord by Fealty onely does diſtrain for Rent, and the Tenant brings a Treſpaſs, and the Lord juſtifies, becauſe he holds of him by Fealty and Rent, and ſo juſtifies the Writ; and the Tenant ſays, that he does not hold of him moda & forma, &c. and it is found that he holds by fealty onely, yet ſhall the Plaintiff be barred, for the matter of the iſſue is, whether the Tenant held of him, or not: for then the Action lies.

And ſo here, the matter of the iſſue is, whether a legal requeſt of the delivery of the poſſeſſion was made or not: and if it were made by the Attorneys of the Bargainees, that in Law ſhall be taken to be the act of themſelves, and ſo ſhall be pleaded: and ſo was it adjudged in this Court, Hillar. 37 Eliz. in Jordans Caſe: Vide Dyer 354.

Object. But it may be objected, That Hawkins had notice of the Bargain and Sale, and therefore the Defendant ſhall forfeit the Obligation, as in Mallories 5 Rep. and Francis Caſe, 8 Rep. 92. in an Entry on condition.

Anſwer. I anſwer, That the Defendant hath bound himſelf by the Obligation, that Hawkins ſhould deliver the poſſeſſion to his Aſſigns, and therefore he muſt take notice thereof at his peril: as in 18 Ed. 4. 24. An Obligation upon condition that the Defendant ſhould account before an Auditor to be aſſigned, when he ſhould be required, and to pay the Arrearages; and it was pleaded, that he did account before ſuch an Auditor aſſigned by the Plaintiff, and was ready to pay the Arrearages, if the Auditor would give notice, &c. and it was held inſufficient, for he ought to take notice at his peril: alſo it is pleaded, and found, that Henry Powle, as Aſſignee of the Plaintiff, did make the requeſt: and if notice had been material, the Defendant ought to have pleaded, that he had no notice; but by his Plea notice is implyed.

Judgment. And after Judgment was given for the Plaintiff, by all the Court.

Rot. 459. ## Michaelm. 15 Jacob. Agard againſt Wilde and others.

IN an Action on the Caſe, for that the Plaintiff is and was of good name and fame, and yet the Defendants maliciouſly intending to cauſe the Plaintiff to be reputed a Common Barretor, the 27 of November, the 14 Jacob. did falſly and maliciouſly procure the Plaintiff to be indicted in this Court, that he was a Common Barretor, and a Diſturber of the Peace at Edmonton in the County of Middleſex, ad communem diſturbationem & inquietationem omnium inhabitantium ibidem. To which Indictment the Plaintiff, Jovis poſt Octab. Hillar. 14 Jac. did plead Not guilty, whereupon iſſue, &c. and the now Plaintiff was acquitted by Verdict and Judgment, to his damage of 300 l. &c.

The ſaid John Wilde ſaid, That at the time of the Indictment he and William Smith were impannelled in the great Inqueſt for the ſaid County, and then in this Court were ſworn to inquire upon their oaths of

of all Felonies, Treſpaſſes, and miſdemeanors done within the ſaid County; and ſo being ſworn, having evidence upon oath of good and loyal men given to the ſaid Defendant and the reſt of his Fellow-Jurors. The ſaid John Wilde, and the other Jurors, there and then upon their oaths, for the Indictment mentioned in the Declaration, did indict the Plaintiff for the ſaid Offence mentioned in the ſaid Declaration, as they might very well do.

Upon which Plea the Plaintiff demurred in Law.

And I conceive that Judgment ought to be given againſt the Plaintiff, for in as much as the Defendant was ſworn of the Inqueſt, and he and the other Jurors upon good evidence did indict the Plaintiff, it cannot be preſumed that he did this on malice, but it was done in zeal to Juſtice by reaſon of his oath: and although it be true that he and the other Defendants did procure the Plaintiff to be indicted of malice without juſt cauſe, yet now the oath of the Defendant hath diſcharged himſelf of the precedent wrong, as may be proved by many Books: 21 Edw. 3. 17. a. In a Conſpiracy for indicting the Plaintiff of Felony, the Defendant pleaded that he was ſworn of the Inqueſt to enquire at the Leet of the Lord Zouch, and that he and the reſt of the Jury did indict the Plaintiff upon their oath: and there Thorp ſaid, That Conſpirators are always in fault: and when one is of the Inqueſt, and ſworn to ſpeak the truth, that which he ſaith then is upon his oath, and not of Conſpiracy; and there is no reaſon to accuſe one of Conſpiracy, where he does nothing.

7 H. 4. 31. In a Conſpiracy to procure the Plaintiff to be indicted of a Treſpaſs, the Defendant ſaid, That they were impannelled for the King before the Juſtices of Peace in the County of Norfolk, and that which they did was upon their oaths: Judgment, &c. The Plaintiff replyed, that there was no ſuch Record, and becauſe the Defendants failed of the Record for two days, Judgment was given for the Plaintiff. 8 H. 4. 6. The Defendants pleaded that they were indicted: the Plaintiff replyed, that they procured the Sheriff to return them. Gaſcoigne, There is no queſtion but that the Jurors ſhall be excuſed of Conſpiracy, by reaſon of their oaths: Vide 20 H. 6. 5. and 19 H. 6. 19. 4 H. 6. 23. And Nat. Brevium 115. C. and D. it is put for a rule, that a Writ of Conſpiracy will not lie againſt the Indictors themſelves, and if Jurors be ſworn to enquire, &c. and after ſome of them be diſcharged by the Juſtices, they ſhall not be puniſhed for any ſuch matter, becauſe it was when they were ſworn; but if they conſpire afterwards, they may be charged with a Conſpiracy. And Stamford 173. if after the Conſpiracy the Conſpirators are ſworn on the Inqueſt to enquire, &c. and they with the others of the Jury do indict him againſt whom they do conſpire, no Writ of Conſpiracy will lie againſt them, becauſe ſuch thing cannot be intended falſe or malicious, becauſe they do it on their oaths, and that with others beſides themſelves. The ſame Law where after the Conſpirators are ſworn and have ſpoken with their companions, they are diſcharged by the Juſtices, yet by reaſon that they were once ſworn, and the Conſpiracy therefore diſcharged. And Old Book of Entr. 122. a. In a Writ of Conſpiracy to procure the Plaintiff to be indicted of Felony, one of the Defendants pleaded Not guilty, and the other that he was one of the Indictors, in the ſame manner as our Plea is, without any Travers, and the Plaintiff replyed nul tiel Record, upon which they were at iſſue, &c. and in the ſame Book are four other Precedents, in all which the ſame Bars are pleaded.

And there is alſo another preſident where the ſame Bar is pleaded, to which the Plaintiff replyed, that the Defendant after the conſpiracy of his Covin did procure the Sheriff to impannel and return him to be one of the Jury, to the intent that he ſhould invict the Plaintiff.

Alſo this Indictment is inſufficient in other reſpects: 1. The concluſion is, ad communem diſturbationem & inquietatem omnium inhabitantium ibidem: the which word [ibidem] does refer onely to Edmonton, and ſo there is no common nuſance, but particularly to them of that Town. 2. There is no place alledged where he was a common Barretor. 3. The Indictment is, that he was a common Barretor, ita quod veriſimilis fuit facere homicidium, lites & diſcordia, & alia gravamina inter vicinos ſuos apud Edmunton prædict. which is not ſufficient, for that it ought to be alledged in fact, that he made or cauſed lites & diſcordia, and not that he was like to make them.

And if an Indictment be inſufficient, although that the party does plead Not guilty and be acquitted, yet he ſhall not have a Conſpiracy or an Action on the Caſe, for by ſuch Indictment he cannot be in any danger: and 9 Ed. 4. 12. If one be indicted on an inſufficient Indictment, and he does not take advantage thereof, but pleads not guilty, and is acquitted, and brings a Writ of Conſpiracy, the Defendants may ſhew how that the Indictment was inſufficient, ſo that the Plaintiff was not duly arraigned, and they ſhall have advantage thereof: Vide Cook. 4 Rep. Vaux Caſe. And 34 H. 6. 9. If the party indicted be miſnamed, and be acquitted, he ſhall not have a Conſpiracy becauſe the Indictment was voyd as to him. And Dyer 286. If the offence in the Indictment be pardoned by a general pardon, and yet the party pleads Not guilty, and is acquitted, he ſhall not have a Conſpiracy becauſe he was in no jeopardy.

And this Caſe being moved by Chilborn Serjeant, and George Crook for the Plaintiff, the fourth of February, 15 Jacob. I ſhewed to the Court, that the Plea was good, for the reaſons and authorities afore cited, and alſo that the Indictment was inſufficient for the Reaſons afore ſhewed.

Judgment. And therefore Judgment was given: Quod querens nihil caperet per Billam.

Michaelmas, 15 Jacob.

Thomas Muſchamp Knight, and Margaret his wife, and Thomas Lock Eſq; and Jane his wife againſt Colan Bluet, Michael Sampſon, Edward Jenny and Elizabeth his wife.

In the Exchequer.

IN an Action of Treſpaſs, for that the Defendants the firſt of January, 14 Jacob. by force and arms the Cloſe of the Plaintiff at Tottenham did break and enter, & poſſeſſionem tenementorum prædict. a prædicto primo Januarii uſque diem billæ (ſcil.) 20 Maii, 15 Jacob. habuerunt, tenuerunt & cuſtodierunt ad damnum 40 l. Quo minus, &c.

The Defendants pleaded Not guilty.

The Jury found, that before the Treſpaſs Sir William Lock Knight was ſeiſed in Fee of the ſaid Tenements, and held them in Socage, and that he and Matthew Lock his ſon were Joynt-tenants in Fee of other Copphold Lands in Tottenham, and that he had iſſue Thomas, Matthew, John, Henry, and Michael.

That

That the 15 Martii, 1549. Sir William made his Will in writing, and thereby did deviſe theſe Tenements to Henry and Michael in theſe words:

I give to Thomas, Matthew, John, Henry, and Michael, my five Sons, my dwelling Houſe in Bow-lane, and my Houſe at the Lock in Cheap, and my Houſe at the Bell in Cheap, to the intent that they or ſome of them may dwell in them, and keep the Retaining Shop ſtill in my name to continue there.

Item, I give to John Lock my Houſe that Parts dwelleth in.

I give to Henry Lock my Houſe that John Edwards dwelleth in.

I give to Michael Lock the three Houſes wherein W. B. and P. dwell.

I give to Henry Lock the Houſe that Rew dwelleth in.

I give to Matthew Lock the two Houſes wherein S. and T. dwell.

I give to Henry and Michael Lock all my Houſes in the Poultry, Bucklersbury, and St. Johns, and a Houſe that Goodman dwelleth in.

I give to Matthew Lock all my Houſes at Dowgate and in the Vintry.

I give to Thomas Lock all my Houſes in Cheap lying in St. Peters Pariſh.

I give to Thomas Lock my Land at Martin and Wimbleton, that I may give him, except one Farm called Martin Holts, which I give to Henry and Michael Lock.

I give to all my five Sons the half of the Leg Entry which I purchaſed of late.

And as touching my Lands at Tottenham, my Son Matthew is joyned Purchaſer with me of the moſt, and the reſt of all my Houſes and Land there which is Freehold, I give to Henry and Michael Lock, upon this condition, that if they ſhall ſell it to any man but to Matthew Lock my Son, then he to enter upon it, as of my Gift, by this my Will.

Item, All the Houſes and Lands that I have given joyntly betwixt my Sons, is, That they ſhall bear part and part-like, going out of all my Houſes and Lands, upon my Bleſſing, as well Freehold as Copyhold, to pay to my Wife Elizabeth for Dowry 40 l. every year, during her life, out of all my Lands and Houſes, as well Copyhold as Freehold; for which Sum I am bound, as appeareth by certain Indentures, &c. and which of my Sons refuſeth to bear his part of the aforeſaid Sum of 40 l. I will that he or they ſhall enjoy no part of my Bequeſt by me to them given in this my Will, but my Gift given to him or them to go to the reſt of my well-willing Sons which be content to fulfil this my Will and Bond that I am bound in to be performed.

Sir William Lock dyed ſeiſed, and Elizabeth his Wife did ſurvive him.

Henry and Michael did enter into the ſaid Tenements, and payd their parts of the ſaid 40 l. to the ſaid Elizabeth: Henry dyes, and Michael payd his part of the ſaid 40 l.

Thomas Lock was Son and Heir of the ſaid Sir William, and had iſſue Matthew Lock his Son and Heir, and dyes.

Matthew, the Son of Thomas, deviſeth the ſaid Tenements to the Plaintiffs, habendum from the death of the ſaid Michael for ſeven years.

The 28 of July, 15 Jacob. Michael Lock dyed ſeiſed of the ſaid Tenements.

And

And the ſaid Colan Bluet, Michael Sampſon, and Elizabeth Jenny the Defendants, are the next Heirs of the ſaid Michael; and that the ſaid Bluet, Sampſon, and Jenny, in the right of the ſaid Elizabeth his Wife, after the death of the ſaid Michael Lock, did enter, upon whom the Plaintiffs did enter, upon whom the Defendants re-entred, and made the Treſpaſs.

But whether the Entry of the Plaintiffs was legal or not, the Jury did doubt: and if legal, they found for the Plaintiff, if not, for the Defendants.

And I conceive that Judgment ought to be given for the Plaintiffs, for I conceive that Henry and Michael Lock had but an Eſtate for their lives by this Deviſe, which by their deaths is ended, ſo that nothing can deſcend to the Heirs of Michael being the ſurvivor, and by conſequence the Leaſe made to the Plaintiffs by Matthew Lock the Heir of the Deviſor, is good, and the Entry of the Plaintiffs is lawful.

The Caſe. And the Caſe upon the whole matter I conceive to be this:

Sir William Lock being ſeiſed of certain Land in Fee, and being Joynt-tenant with Matthew Lock, one of his Sons, of Copyhold Land within the ſame Town, had iſſue Henry, Michael, Thomas, and two other Sons, and by his Will did deviſe to his Sons divers Lands ſeverally: And after ſays, Touching my Lands at L. my Son Matthew is joyned Purchaſer with me already of the moſt, and the reſt of all my Land there, which is Freehold, I give to Henry and Michael, upon condition, that if they ſell it to any but to Matthew my Son, then he to enter as of my Gift: and then he declares, That of all theſe Bequeſts his Sons ſhall bear part and part-like, out of all his Copyhold Lands and Free, to pay to Elizabeth his wife for her Dowry 40 l. a year during her life; and that Son which ſhall refuſe to bear his part, ſhall not enjoy any part of his Bequeſt, but it ſhall be to the reſidue, &c. Sir William Lock dyes, Henry and Michael enter, and pay their parts of the 40 l. Henry dyes, and then Michael dyes: And now the Queſtion is, Whether the Defendants, being Heirs of Michael, ſhall have the Land, or the Plaintiffs, who claim under the Deviſor?

And for the better arguing of this Caſe: I will firſt obſerve, that here is not any expreſs words of limitation of an Eſtate, to make any greater Eſtate to paſs then an Eſtate for life: and then I will ſhew, that here are no words in any part of this Will to ſignifie any certain intention in the Deviſor to make an Eſtate of Inheritance to paſs by this Deviſe.

And as to the firſt, the Deviſe is onely to his two ſons: viz. The reſt of all my Houſes and Lands there, which is Freehold, I give to Henry and Michael Lock: and theſe are all the words of limitation of the Eſtate; and theſe, without queſtion, in a Deed or Feoffment, will not make a greater Eſtate then for life. And ſo is Littleton 1. If one purchaſe Land in perpetuum, or to him and his Aſſigns in perpetuum, this is but an Eſtate for life, becauſe it wants theſe words, his Heirs, which words make the Inheritance in all Feoffments and Grants; and this is an infallible Rule in Grants, unleſs it be in ſome ſpecial Caſes, as in Frankmarriage or Frankalmoine, which being words of art, do paſs an Inheritance with theſe words, Heirs.

And in Caſes of Grants, no intention of the Grantor, although it be apparent in the Grant, will make an eſtate of Inheritance to paſs: as in 19 H. 6. 73. 20 H. 6. 36. A Gift to B. and C. & hæredibus, with Warranty to them and their Heirs, is no Fee-ſimple, becauſe the words

of

of limitation are incertain to whom hæredibus ſhall be referred, and ſo all one as if it were omitted: and then the clauſe of Warranty, although it does declare a certain intent to give an Eſtate in Fee, will not amend the matter in a Grant. And ſo in the 1 Rep. Shelleys Caſe: if one gives Land to one, & liberis, or eitibus ſuis, or ſemini ſuo, it is but an Eſtate for life, and not an Eſtate in Tayl, yet there is an apparent intent, but that will not ſuffice in a Grant.

But I agree, that in Caſe of a Deviſe, although the apt words to make an Eſtate of Inheritance to paſs are omitted, yet if the intent of the Deviſor does appear by any expreſs matter contained in the Will, an Eſtate of Inheritance ſhall paſs, for it is ſufficient to paſs the Inheritance. And ſo Litt. 133. 6. 19 H. 8. 9. 6. If one deviſeth Land to another in perpetuum, the Deviſe by theſe words ſhall bar an Eſtate in Fee: ſo if one deviſe Land to another, to give, diſpoſe, or ſell at his pleaſure, this is an Eſtate in Fee-ſimple: 19 H. 8. 9. 6. 7 Edw. 6. B.

But yet the Law hath reſtrained ſuch intent.

For firſt, it ought to be agreeable to Law, and not repugnant to it; 1.
for although in Scholaſticas Caſe, in the Comment. it is ſaid, that a Will is like to an Act of Parliament, yet a Will cannot alter the Law, or make a new form of an Eſtate, which is not allowed by the Rules of Law, as an Act of Parliament is: and ſo adjudged in the Common Bench, Hillar. 37 Eliz. between Jermin and Aſcot, Cooks 1 Rep. 85. in Corbets Caſe: That by a Deviſe a man cannot give an Eſtate, and determine part thereof by a condition, and make the reſidue to continue. And if Land be deviſed to one in Tayl, he cannot determine the Eſtate as to the Deviſee himſelf, and yet preſerve the Eſtate to the iſſue: as was endeavored in this Caſe.

And 28 and 29 H. 8. Dyer 33. If Land be deviſed to one in Fee, and if he does not perform ſuch an Act, the Land ſhall remain to another, the remainder is void, for no ſuch remainder can be limited by the Rules of Law.

This intent ought to be expreſt in the Will, and collected out of 2.
the words of the Will, and cannot be averred or ſupplyed by any foreign matter, as in Matthew Mannings Caſe, 8 Rep. 95. 6. Always the intention of the Deviſor, expreſſed in his Will, is the beſt Expoſitor, Director, and Diſpoſer of his words. And Lord Cheyreys Caſe, 5 Rep. 68. Sir Thomas Cheyrey deviſed certain Land to Henry his Son, and the Heirs males of his body, the remainder to Thomas Cheyrey of Woodley, and the Heirs males of his body, upon condition, That he or they or any of them ſhall not alien: and the Queſtion was, whether there could be an averment, that the intent of the Deviſor was to reſtrain H. and his Heirs from aliening: and reſolved that no ſuch averment could be received, for conſtruction of Wills ought to be collected out of the words of the Will.

The intent of the Deviſor ought to be manifeſt and certain, and not 3.
dubious, as in a Deviſe of Land to one for ever, here the intent is to give an Eſtate in Fee-ſimple, for no other Eſtate can continue for ever: ſo if the deviſe be to one and his Heirs, and if he dyes without Heir, that it ſhall remain to another, his intent any ways, that the word His in the firſt Deviſe ſhall be taken for the Heirs of his body; for the Law will ſooner preſume him to be dead without iſſue, then to be dead without Heir.

And

And now to examine our Caſe with the Rules of Law: There are three clauſes in this Will, as I conceive, upon which the pretences of the Defendants are founded to have an Eſtate in Fee paſs by this Deviſe, to which I ſhall make anſwer ſeverally.

1. The precedent clauſe to the Deviſe: And as touching my Lands at T. my Son Matthew is joyned Purchaſer with me of the moſt, and the reſt of all my Houſes and Lands there, which is Freehold, I give to Henry and Michael Lock, &c. And as to this, I conceive that here is no colour to enlarge the Eſtate to the Deviſees, but this clauſe is onely a deſcription of Land which he does not intend to deviſe, and which in truth he cannot deviſe, becauſe that Matthew ought to have it by ſurviv̄or, and is principally named therein, becauſe of preventing any queſtion between Matthew and the two Deviſees after his death; for otherwiſe they might perhaps have pretended that all the Lands in T. ſhould paſs to them eſpecially, becauſe they were purchaſed as it might very well be preſumed, with the mony of the Deviſor, and he was reputed owner thereof, but theſe words make no Declaration as to the Eſtate which he intends to demiſe to Henry and Michael.

2. The Condition or limitation annexed to the Deviſe, in theſe words: Upon condition, that if they ſell it to any man but to Matthew Lock my Son, then he to enter upon it as of my gift, by this my Will: and I conceive that this clauſe does not ſhew any intent of the Deviſor to enlarge the Eſtate firſt limited to Henry and Michael, or to give an Eſtate in Fee to them; for it is not if they alien in Fee or in Tail, or if they or their Heirs do alien, which words, or any words to ſuch intent, would have declared a manifeſt intention that the Deviſees ſhould have a Fee ſimple: but here an alienation in general onely is reſtrained, which ought to be taken for a legal alienation, and ſuch a one as they may make by reaſon of the Eſtate deviſed to them.

And that it ſhall be ſo intended, firſt, it is to be conſidered, that this condition is a reſtraint annexed to the Eſtate, and is as a Conditi to the Eſtate, and therefore cannot be properly more large then the Eſtate it ſelf: for it is a Rule, that every reſtraint or exception in an Aſſurance ought to operate upon the Eſtate, or the thing before granted: as in the Comment. 370. Zouches Caſe: An exception is an exemption of that contained in the general words, and if it be not contained in the generality, it can be no exception in the ſpecialty, and therefore if one doth leaſe W. acre, excepting B. acre, the exception is vain.

3. This exception of alienation is more proper to be annexed to an Eſtate for life, then in fee; for he who makes a Leaſe for life or years, may reſtrain the Leſſee by condition, that he ſhall not alien, but the Feoffor cannot reſtrain the Feoffee from alienīng: as in Littleton 84. If a Feoffment be made on condition that the Feoffee ſhall not alien, the Condition is voyd, for the Feoffee hath power to alien to whom he will, for if that condition were good, that would take from him the power which the Law gives him, which would be againſt Reaſon: but if the Condition be, that he ſhall not alien to ſuch a perſon, naming the perſon, or any of his Heirs or his iſſues, this is a good Condition, becauſe it takes not away the power to alien in Fee. And Vernons Caſe, 4 Rep. fol. 3. An Eſtate in Fee, conveyed by the Husband or his Anceſtor to a woman for her Joynture, is not a Joynture within the Statute of 11 H. 7. which reſtrains alienations made by women: for to reſtrain ſuch an Eſtate as cannot be alienēd, is repugnant and againſt

againſt the Rule of Law, and therefore not within the intention of the Act.

But it hath been objected on the other ſide; 1. That this Condition is not voyd, becauſe it doth not reſtrain all their power, but leaves them to the liberty to alien to Matthew. 2. If the condition be voyd, yet it is ſufficient to declare the intent of the Deviſor that a Fee ſhould paſs. Object.

And as to the firſt, I conceive that the condition is voyd; for to reſtrain generally, and that he ſhall not alien to any but to J. S. is all one: for then the Feoffor may reſtrain him from aliening to any except to himſelf, or ſuch other perſon by name, whom he may well know cannot, nor never will, purchaſe the Land: So that this condition ſhall take away all his power, and ſhall make a perpetuity in the Feoffee, which is quite contrary to Law, neither is there any authority to warrant this reſtraint: for Littleton leaves the Feoffee at liberty to alien to any, except to ſuch a one in particular. Anſwer.

And as to the ſecond, I do agree, That if the condition to reſtrain the alienation had been expreſly to reſtrain the Deviſees and their Heirs, or to have reſtrained from aliening in Fee or in Tayl, or for anothers life, although the condition had been voyd, yet had it been ſufficient to have ſhewn the intent of the Deviſor, and to have cauſed an Eſtate in Fee to have paſſed. And therefore I do agree to the caſe in the 9 Rep. fol. 127. where one deviſed to his Wife for life, and after her deceaſe his Son William to have it, and if William ſhall have iſſue male, that he ſhall have it, and if he have not iſſue male, his Son S. ſhall have it, and if he hath iſſue male, his Son ſhall have it, with like Remainders to his other Sons; and my Will is, If any of my Sons, or their Heirs males, iſſues of their bodies, alien, then the next Heir to enter, &c. And it was reſolved, That the Son ſhould have an Eſtate in Tayl by this Deviſe: Firſt, by reaſon of theſe words, If he have no iſſue male, which is as much as to ſay, If he dye without iſſue male. Secondly, becauſe he and his Heirs males are reſtrained to alien: for every reſtraint (eſpecially in Wills) does imply, that the party, in caſe he were not reſtrained, had power of the thing reſtrained. And ſo Bakers Caſe, Hillary 42 Eliz. Rot. 143. A Deviſe to the Husband and Wife, the Remainder to their two Sons, upon condition, that if they or their Heirs go about to alien, &c. is a Fee-ſimple alſo; for the Heirs being reſtrained to alien, does ſhew fully, that the Heir ſhall have the Land, for otherwiſe he cannot alien it.

But here in our condition, there are not any words to ſhew the intent of the Deviſor, that an Eſtate in Fee ſhall paſs, but the Deviſees are reſtrained to alien generally, which, as already I have ſhewed, is more agreeable to an Eſtate for life, then an Eſtate in Fee-ſimple, at the leaſt he does not ſhew any certain intent, that the Deviſees ſhall have an Eſtate in Fee, but that remains dubious, and therefore the ſafe way is to take the ſame according to the Rules of Law.

The third clauſe to explain the intent of the Deviſor in this caſe is the clauſe of the Charge impoſed upon the Land by the Deviſor, viz. Item, All the Lands I have given joyntly betwixt my Sons, is, that they ſhall bear part and part-like, going out of all my Lands, as well Free as Copyhold, to pay to my Wife Elizabeth for Dowry 40 l. every year during her life out of all my Lands, &c. And I conceive, that this

clauſe makes nothing as to the enlargement of the Eſtate; and yet I do agree, That if one deviſe Land to another, paying 20 l. or another ſum in groſs, this is a good Deviſe in Fee; but it is otherwiſe when the Land is deviſed to one paying an annual Rent, or bearing an annual charge with the profits thereof: as in Colliers Caſe, 6 Rep. where one deviſed Land to his Wife, and with the profits that ſhe ſhould bring up his Daughter, and that after her death the Eſtate ſhould remain to his Brother, paying to other perſons 40 s. and the value of the Land was 3 l. per annum; and agreed there, that the Brother had a Fee-ſimple: and this diverſity was reſolved in that caſe, That if the Deviſe had been to the Brother, to the intent that he ſhould maintain his Daughter with the profits, or pay out of the profits thereof ſo much to one, and ſo much to another, that this is but an Eſtate for life, for he is ſure to have no loſs; ſo is it, if it be to pay certain ſums yearly under the value of the Land, for he may pay it out of the profits, and is ſure to be no loſer. And this is in effect our very caſe: For firſt, the Charge is impoſed for Dower, which cannot be intended to exceed the annual value of the Land: Secondly, it is to be payd out of the Land, and therefore there is no charge impoſed upon the perſon of the Deviſee, but onely upon the Land deviſed to him, ſo that he takes the Land with this charge, and when his Eſtate determines in the Land, yet the charge does always remain upon the Land, and the Deviſee is diſcharged thereof; and therefore this charge may as well be, if he have an Eſtate for life, as if he have a Fee-ſimple. And as to that in Boraſtons Caſe, 3 Rep. fo. 20. b. between W. Allock and Hammond, where a Copyholder deviſed his Land, paying to his Daughter and to each of his younger Sons 40 s. within two years after his death, and ſurrendred accordingly, and dyed; and agreed, that the Deviſee had an Eſtate in Fee, although the annual profits exceeded the mony that was to be payd; and the Reaſon is plain, for it is not limited to be payd out of the Land or profits, but is a payment in groſs, and it may happen that the Deviſee may dye before he can receive ſo much of the profits.

29 H. 8. Teſtament 18. 4 Ed. 6. Eſtates 78.

And afterwards, viz. Trinit. 17 Jacob. All the Barons, (ſcil.) Tanfield, Bromley, and Denham, delivered their Opinions ſeverally, That Henry and Michael Lock had an Eſtate onely for their lives, becauſe there is no expreſs words in the Deviſe to make any greater Eſtate to paſs, and the condition or clauſe of the charge impoſed by the Will ſtill, does not neceſſarily imply, that they ſhould have a greater Eſtate then for life, for ſuch Eſtate may ſatisfie both theſe clauſes, as well as an Eſtate in Fee, and the condition is more proper to be annext to an Eſtate for life, then in Fee.

Judgment. Wherefore they reſolved, That Judgment ſhould be given for the Plaintiffs: but becauſe Sir Thomas Muſchamp, one of the Plaintiffs, dyed, hanging the Action, no Judgment could be enter'd.

Trinit.

Trinit. 16 Jacob. Wood againſt Searl and Jeo.

IN an Action of Treſpaſs, for that the Defendants the 16 of December, 15 Jacob. ten Hides of Leather of the Plaintiffs, amounting to the value of 10l. at Tiverton, did take and carry away, ad damnum 20l. &c.

The Defendants as to the force and arms pleaded Not guilty, and as to the reſidue they ſaid, that the City of Exeter is, and time out of minde was an ancient City, and that within the ſaid City there is, and for all the ſaid time was a Society of the Art of Cordwainers, incorporate, by the name of The Maſter, Aſſiſtants, Wardens, and Commonalty of Cordwainers of the City of Exeter; and that the ſaid Maſter, Aſſiſtants, and Wardens, have uſed for all the ſaid time to make Bylaws for the government and profit of the ſaid Society, and to impoſe reaſonable Fines and puniſhments upon the breakers thereof.

And that the 24 of July, 44 Elizab. the Maſter, Aſſiſtants and Wardens did ordain, That no perſon, Burgeſs, or Foreigner, not being a Brother of the ſaid Society, ſhould make, ſell, or offer to ſell, or procure to be ſold within the aforeſaid City of Exon, the County or liberty thereof, any Boots, Shooes, Pantofles, Pumps, or Startops, or any other wares belonging to the ſaid Art, under pain of forfeiting to the ſaid Maſter and Wardens for the time being, for every offence ſuch ſum (not exceeding 40s.) as ſhall be aſſeſſed by the Maſter, Wardens and Aſſiſtants, or the greater part of them: and that if any perſon of the ſaid Society, or any other exereiſing the ſaid Art, or any thing concerning the ſame, inhabiting within the ſaid City, or the County or liberty of the ſame, who ſhall break the ſaid Order, ſhall refuſe to pay ſuch ſum as ſhall be aſſeſſed, upon true proof firſt thereof had of the breach of the ſaid Order, that it ſhall be lawful for the ſaid Maſter, Aſſiſtants and Wardens, or any three of them, taking with them a Conſtable, Bayliff, or Serjeant of the Mace, or other fit Officer of the Kings, to enter into the Houſe, Booth, Shop, Warehouſe, or Cellar of ſuch perſon ſo refuſing, and there, by the diſcretion of the ſaid Maſter, Aſſiſtants and Wardens, or the greater part of them, to diſtrain any of their goods then being within the ſaid Houſes, &c. for the ſaid ſums forfeited, ſo that it doth not exceed the treble value of the ſums forfeited, and to detain the ſame: Yet nevertheleſs if the owner within thirty days ſhall ſatisfie the penalty, then they ſhall redeliver the goods: And if he doth not ſatisfie, that then the ſaid Maſter, Wardens and Aſſiſtants, or the greater part of them, have power to appraiſe the goods taken by the oath of ſix perſons, and thereupon to ſell them, and to reſtore the ſurpluſſage to the owner.

And the Defendants ſaid, That at the ſaid time in which, &c. and time out of minde, there was and ought to be a Maſter, two Wardens, and twelve Aſſiſtants of the ſaid Society within the ſaid City, and no more; and that the ſaid Edward the firth of December, and before, and ever ſince, was Maſter, and the ſaid William and Thomas Payn were Wardens.

That the 29 of July, 15 Jacob. the Plaintiff at the ſaid City then being an Inhabitant within the ſaid City, and no Brother of the ſaid Society, did make divers Shooes, and them there to ſale did expoſe, and that the ſaid Maſter and Wardens, and one J. G. T. K. R. J. W. T.

K. T. C.G. and J. G. being ſeven, and the major part of the ſaid Aſſiſtants, the thirtieth of July, the 15 Jacob. did impoſe upon the Plaintiff 33 s. 4 d. for the ſaid offence.

And they ſaid further, that the Plaintiff committed the like offence the ſeventh of October, 15 Jacob. and 33 s. 4 d. impoſed by the Maſter, Wardens and Aſſiſtants, and the like offence the 20 of Novemb. 15 Jacob. and 33 s. 4 d. impoſed by the Maſter, Wardens, and eight of the Aſſiſtants; and the like offence the ſecond of December, 15 Jacob. and 33 s. 4 d. impoſed the third of December the ſame year, by the Maſter and Wardens, and nine Aſſiſtants.

All which ſums do amount to 6 l. 13 s. 4 d.

That the ſixth of December, the 15 Jacob. the Plaintiff had notice of the ſaid ſums ſo impoſed, and although he thereupon payd 19 s. parcel thereof, yet he did refuſe to pay the reſidue, which refuſal the 16 of December was duly proved before the ſaid Maſter and Wardens: wherefore the 16 of December, 15 Jacob. the Maſter, Wardens and Aſſiſtants, taking with them John Sowland a Serjeant of the Mace, did take the ſaid ten Hides in the ſaid City, in the name of a Diſtreſs, and took them away, detained them for thirty days after the ſaid Diſtreſs: and becauſe the Plaintiff did not pay the reſidue of the ſaid 6 l. 13 s. 4 d. nor agreed for the ſame, the ſaid Maſter and Wardens, and T. B. C. G. M. A. T. K. J. G. M. B. K. J. W. T. and R. T. being the major part of the Aſſiſtants, after the ſaid thirty days, viz. 17 Jan. 15 Jacob. at the ſaid City did cauſe the ſaid Hides to be appraiſed by the oaths of R. S. &c. ſix approved men of the ſaid City, who appraiſed them at 7 l. and the ſaid Defendants, and Thomas Payn, and the major part of the ſaid Aſſiſtants, did ſell them for 7 l. and they ſaid, that the ſurpluſage amounted to 25 s. 8 d. and no more, which the ſaid William and Thomas Payn, with the aſſent of the Maſter and greater part of the Aſſiſtants, before the Suit, to wit, the ſeventh of January in the ſame year, at the ſaid City did offer to pay to the Plaintiff, but he refuſed to accept thereof. Abſque hoc, that the Defendants are guilty at Tiverton, or any other place out of the ſaid City of Exeter.

Upon which Plea the Plaintiff demurred.

And I conceive that Judgment ought to be given for the Plaintiff.

And herein I will not ſtand at this time to argue, whether the Cuſtom will warrant this By-law, becauſe there hath been a reſolution in the Caſe in the 8 Rep. fol. 125. for London; onely I obſerve that the Cuſtoms of London are confirmed by Act of Parliament, but ſo are not the Cuſtoms of Exeter.

But admitting that the Cuſtom will warrant this By-law, to reſtrain a legal Trade or Art within the ſaid City, yet I conceive this By-law is utterly void for three cauſes; and if it were good, yet have not the Defendants purſued the ſame, in taking and ſelling of the goods, and that for two cauſes.

I. And as to the firſt, the Defendants have exceeded their Cuſtom in the extent of this By-law as to the place, for the Society of the Art is alledged to be within the City of Exeter; and then they alledg the Cuſtom to be, That they have uſed to make By-laws for the better Government and profit of the ſaid City; ſo that all the Cuſtom is confirmed to the City: but the By-law does exceed this, for it is, That none ſhall make, ſell, or offer to ſell any Shooes, &c. within the City or the County of Exon; the which is not warranted by the Cuſtom: as in 5 Rep. Chamberlain of London's Caſe, it was ordained, That if any Citizen

Citizen or ſtranger ſhould ſend any Cloth to ſell within the City before it ſhall be brought to Blackwell-Hall to be viewed and ſearched, this is reſolved to be good, although it do bind a ſtranger: but the reaſon thereof is given, becauſe the offence is committed within the City; whereupon I obſerve, that they can make no Order to extend without the City.

This By-law does exceed their power in the things prohibited, and that in two things: Firſt, That none ſhall make any Boots, Shoes, &c. within the City or County, whereby every man is reſtrained to make ſuch things for his own uſe, or for his Maſter or Family, and ſuch reſtraint is clearly againſt Law and Reaſon: for although that Companies of Trades in Cities and Towns are allowed by the Law, yet they cannot by any Cuſtom reſtrain a man from making any thing pertaining to their Art for his private uſe: and therefore if this By-law had been, That none ſhould uſe the Art of a Shoomaker within the City, this had been good; but to reſtrain any, that he may not make Shoes for himſelf within the City, this is void. Vide Cooks 8 Rep. 129. Wagons Caſe: where it was reſolved, That he might make Candles for his own uſe; and ſo every one may bake and brew for their own uſe. II. 1.

Furthermore, the Defendants have not alledged any Cuſtom, That none ſhall make any Shoes, &c. within the City, &c. except thoſe of the Society, but onely that they may make By-laws for the good government and profit of the Society of the Art; and the making of Shoes for ones private uſe is nothing concerning their Society: and this is proved by the reſolution in the ſaid Caſe, and by the Statute of the fifth of Elizab. That none ſhall uſe any Art, in which he hath not been educated as Apprentice for ſeven years; yet it is lawful for any to bake or brew, or to make any manufacture for his private uſe, without any offence to the Statute. So Cooks 8 Rep. 125. Sir George Farmers Caſe: He as Lord of the Manno of Torceſter did preſcribe to have a Bakehouſe, and no other Baker ſhould ſell bread there, this was a good Cuſtom, but to reſtrain any from baking for himſelf cannot be a good Cuſtom. And the Caſe of the Taylors of Ipſwich, 11 Rep. fol. 55. Order, That none ſhould uſe the Trade of a Taylor, until he be preſented to the Maſter and Wardens, and allowed by them; yet one may make Clothes for his Maſter and Family, in caſe the ſaid conſtitution were good.

This By-law does reſtrain other perſons to uſe their Arts; for it is, That none ſhall do any thing pertaining to the Art of Shoomakers: and it is apparent, that many things do pertain to the Art of a Shoomaker, which are to be done by other Artificers; for all things belong to the Art which of neceſſity muſt be uſed with the Art, and without which the Art cannot be uſed; as Leather, which is to be made by the Tanner; Laſts, which are to be made by the Laſt-maker; Awls, by the Smith; Thread, and divers other things: and all theſe by this By-law are prohibited, not onely to be ſold, but alſo to be made by any not being of their Society. 2.

The penalty impoſed by this By-law, is not warranted by the Law, nor by their Cuſtom, for that ought to be reaſonable, and ought to be expreſt, to the end that the Court may judg whether it be reaſonable or not: and therefore it is reſolved in Wagons Caſe, That the Pain ought to be reaſonable, 1. In reſpect of the manner thereof; and therefore it ought not to be by impriſonment, for that is againſt Magna Charta 3.

Charta, cap. 29. as it was adjudged in Clarks Caſe, 5 Rep. fol. 64. 2. In regard of the quality: and therefore it is much debated in Wagons Caſe, if the penalty of 5 l. were reaſonable or not: but here no certain penalty is ſet down, but left to the diſcretion of any of the Shoomakers of Exeter, and that is againſt the courſe of all Laws; for when a Law is made, it is neceſſary that the penalty thereof ſhould be known, to the end men might not offend.

But admitting this Order to be good, yet have not the Defendants purſued the ſame in the taking of this Diſtreſs, and that for two Reaſons:

I. They have diſtrained before their time, for the Order is, That if any refuſe to pay the ſum aſſeſſed, that then upon due proof thereof they may diſtrain, &c. and then they plead, that the refuſal of the Plaintiff to pay the ſame, was duly proved before the Maſter and Wardens, which is inſufficient: for when it is ſaid, upon due proof, this is intended upon proof by Verdict: as in 10 Ed. 4. 11. On a Bond with condition, that if the Obligor proves that it was the will of A. that B. ſhall make an Eſtate to the Obligor, &c. this proof muſt be by Verdict: but if it be to be proved before J. S. there it is ſufficient to produce witneſſes that will teſtifie the ſame: and ſo in the fourth and fifth of Queen Mary: where Buckland was bound to the Lord Ewers, to produce before the ſaid Lord ſufficient witneſſes to diſcharge a certain debt due by B. to the Lord: and he pleaded, that he produced W. and A. before the ſaid Lord, and that they proved, that he did not owe the ſaid Debt; and agreed to be no good Plea, becauſe he did not ſhew how the proof was made before the ſaid Lord.

So that this Plea is utterly inſufficient, 1. Becauſe no ſuch proof can be made before the Maſter and Wardens, as is intended by the Order. 2. Becauſe the Defendants have not ſhewn how the proof was made, ſo that the Court might judg whether it were ſufficient or not: and ſo in 22 Ed. 4. 40. the Lord Liſles Caſe: upon a Bond, that if the Defendant ſhewed ſufficent diſcharge of a Rent, &c. who pleaded that he did offer to ſhew a ſufficient diſcharge, and agreed to be no Plea, for he ought to ſhew what diſcharge, that the Court might judg thereof.

So in the ninth Report, Caſe of the Abbot of Strata Marcella, fol. 34. in a Quo Warranto, the Defendant pleaded, that the Abbot had and uſed divers liberties, which he could not have without a Charter, and reſolved no Plea, unleſs by reaſon of the Statute of the 32 of H. 8. cap. 20. for reviving of Liberties.

II. The Order is, That upon refuſal to pay the penalty, and upon proof thereof, the Maſter, &c. may enter into the Houſe, Booth, Shop, Warehouſe, or Cellar of the Offendor, and there to diſtrain any of his goods, &c. And the Defendants have not averred, that theſe goods were taken in any of the ſaid places, but onely at the City of Exeter.

Judgment. And at laſt it was adjudged that the Plea was not good.

THE

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